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WILCOX & CO

No. 10383

United States Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THOMPSON PRODUCTS, INC., a corporation,

Respondent.

Transcript of Record

In Three Volumes

VOLUME III

Pages 981 to 1330

Upon Petition for Enforcement of an Order of the National Labor Relations Board

Rotary Colorprint, 590 Folsom St., San Francisco 60-5-12-43

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(Testimony of Clarence L. Millman.)

RESPONDENT'S EXHIBIT No. 1-WW

January 29, 1942.

Correction for minutes of the Labor Relations meeting held January 8, 1942.

Investigation revealed that the errors made by Mr. George Durand were of a minor nature, and the minutes of this meeting are hereby corrected, deleting the word "expensive errors" and substituting "minor errors".

/S/ P. D. HILEMAN
For The Company

/S/ IRVIN HESS
For the Alliance

Minutes of a meeting held at 2:30 p. m., Thursday, January 8, 1942, between the Committee of the Pacific Motors Parts Workers Alliance and the Management representatives.

Mr. W. I. Metzger was introduced as a guest of the Management and Mr. O. P. Wright was introduced as a guest of the Committee.

Mr. Millman suggested that Mr. Hess open the meeting since he had several things on this list, and Mr. Hess replied Mr. Sterbens felt it was rather unfair to him to have to furnish his own gloves since he had doubled production on the torch hardening job since taking it over. Mr. Kearns took exception to Mr. Sterbens' remark concerning doubling production, and Mr. Hess replied that the production rate had been 400 pieces when Mr. Sterbens started and was *not* 800 pieces. Mr.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

Kearns replied that the standard on this job had always been 600 and that Mr. Sterbens had not doubled the production. Mr. Hess remarked that Mr. Sterbens had kept a check on the number of gloves used and in 26 working days he had used 29 pair of gloves. These gloves were purchased by Mr. Sterbens at a cost of 32c a pair. Mr. Hileman commented that Mr. Bebb had done this work back in 1936 and asked Mr. Bebb what he thought about it. Mr. Bebb stated he had done 600 pieces at that time and had not worn any gloves, merely because it had not occurred to him to do so. However, Mr. Hileman suggested that a study be made of the jobs requiring gloves, and on those jobs where gloves wear out quickly it might be that the company can furnish them if they are absolutely necessary. He definitely stated that we would not go back to the old system of furnishing gloves for everyone and that if we decided on a plan of furnishing gloves when necessary, the privilege must not be abused.

Mr. Hess then referred to Mr. Wright and asked that his job of Aircraft Stem Grinding carry the same rate as the Cylindrical Grinding. Mr. Kearns stated he had talked to the Foreman on this subject and it was the general opinion that the job was worth as much as the Cylindrical Grinding. He remarked that Mr. Wright had done considerable pioneering on this work and had done a good

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

job. Mr. Millman observed that these things had been considered when the Aircraft Stem Grinding rate had been set some months ago, and that it was decided since the stem grinding job was repetitive and the Cylindrical grinding was of a greatly varied nature, this job should not carry the same rate, although it should be higher than the special grinders. Mr. Millman asked Mr. Kearns if he felt skill on these two jobs were equal and Mr. Kearns stated he did. Mr. Hileman reminded Mr. Kearns he had reversed his position and Mr. Kearns agreed but he still believed the rate *just*fiable. It was agreed then by Management that a rate of $1.11 be set on this Aircraft Stem Grinding job and a rider would be attached to the contract.

Mr. Hess then suggested that the Thread Grinder rate be raised to $1.01, the same as Special Grinder. He remarked that Mr. Paul Miller believed the type of work being done by our Thread Grinders required as much skill as the Special Grinders and rates should be equal. At this point Mr. Miller was called into the meeting, and upon being questioned, stated he did believe the jobs were equal. He was asked if they were considered so in the Cleveland Plant, and replied that they were not since the thread grinding work there was more or less mechanical and was not as varied as our work in this plant. Mr. Hileman asked the Committee if they would grant Management a few days in which to consider this problem, and re-

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

minded them that we were expecting a lot of thread grinding jobs with a Class 4 fit, and if our rate on this work was too high we would lose the orders. He agreed that by the next meeting a decision would be made on this subject.

Mr. Hess then asked that some form of heating system be placed in the lunch room so it would be more comfortable for employees. Mr. Millman replied that plans were made for canvas drops to be placed on the two walls which are not screened in. He pointed out that canvas was preferable to glass in that it could be raised during the hot days in the summer to allow for ventilation. He informed the Committee it was contemplated placing two oil drum heaters in the lunch room. It was not desired to put new, expensive heaters there because of the dampness which would cause them to deteriorate rapidly. Management informed the Committee heat would be installed in the lunch room as soon as possible but there was no point in installing heaters until the canvas could be placed in position, and it would probably be sometime before this could be done due to lack of available material.

Mr. Overlander then brought up the subject of Mr. George Durand in the Toolroom, who felt he should receive more money. Mr. Kearns reported that he had talked to Toolroom Superintendent Schindler regarding Mr. Durand, and Mr. Schin-

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

dler did not feel he was worth more money at this time. The majority of his work was satisfactory, but a number of expensive errors had been made by Mr. Durand and he was put on the coppers because this was not as exacting a job as some of the other die work. Mr. Overlander said he understood Mr. Durand had been placed on the coppers because a former employee, Mr. Tappey, had not been able to do this job satisfactorily. Mr. Millman stated Mr. Durand had primarily been placed on this job because Mr. Tappey had continually asked for day work and it was felt that he and Mr. Durand could alternate, thereby giving them both an opportunity to work some days. Mr. Kearns expressed surprise that this subject had come up since it had been three weeks or so since he and Mr. Schindler had discussed it and Mr. Durand should have been informed. Mr. Overlander replied he was not sure, but he thought Mr. Schindler had done so. Mr. Millman then telephoned Mr. Schindler, who replied he had notified Mr. Durand of his decision several weeks before.

Mr. Millman then told the Committee that the Management had been considering setting a rate for Class B. Toolmakers this rate to carry a top of $1.17, which is two cents higher than the minimum rate for Toolmaker Class A. He pointed out to the Committee the obviousness of the fact that tool making was a job which was not learned in

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

a few months time, and as soon as a man was moved from the Die Department into the Tool Department he immediately began to demand the top rate for Tool Makers. It is against the Management's policy to hold any man under the top rate for too great a period, unless he is an exceptional case, and it was believed that more personal satisfaction would be held by the employees if an intermediate rate were established between the Die Department and the Tool Maker Class A. This suggestion being agreeable to the Committee, it was decided to attach a rider to the contract.

Mr. Overlander then brought up the case of Mr. Moretz, who has the supervision of the die makers, and asked if Mr. Moretz was getting more money for this increased responsibility. The question had been brought up when the men working under Mr. Moretz were due for an increase. Mr. Millman stated that the Management had considered giving Mr. Moretz the set-up rate since this department will be increased and his responsibility will be greater.

Mr. Hess referred to the amount of time required by the Committee for listening to the complaints of the individual members, and stated considerable production time was taken for this reason. Mr. Millman replied he knew far too much time was being spent by Committee Members and employees in talking over their business during hours which should be spent on production and

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

that something must be done about this. Mr. Hileman suggested that the Committee appoint one man each day to hear complaints at a set hour, after working time. He stressed the fact that time spent during working hours must be spent on production and not on Union business.

Mr. Hess then brought up the subject of overtime for hours worked on Saturday, January 3, 1942. Mr. Hileman informed the Committee that only forty-eight hours had been worked in that week and the eight hours overtime had been paid at double-time rather than time and one half and he was unable to see any logical reason for the Committee or anyone else expecting the Company to pay overtime at time and one-half for Saturday in addition to the double time they had received for the eight hours overtime. It would mean, of course, that the company would be paying two and one-half times the regular hourly rate for eight hours overtime worked in that week. Mr. Hileman asked if there was anything in the contract that specified they should be paid at this rate, to which Mr. Hess replied, no, but there was likewise nothing in the contract which said they should not be paid at this rate. Mr. Hileman asked if any other plant had paid this item, to which Mr. Baldwin replied that the Douglas Plant had.

Mr. Baldwin stated he felt the double time for New Year's Day was extra compensation paid for

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

that holiday and should not be considered when computing the regular overtime rate for the week. Mr. Smith stated he had called the National Labor Relations Board on this point, and Mr. Sargent there had told him while this was out of their line, he privately, was of the opinion this should be paid. Mr. Hileman remarked this was one man's opinion, and the company could see no reason legally or voluntarily why this extra overtime should be paid. It was pointed out to the Committee that if this were paid it would mean that for the eight hours worked over the regular forty hour work week for that week, the rate of pay would be two and one-half times the regular rate. Mr. Millman stated that such a situation occurred every week with the employees who worked on Sunday, and it *was* apparently has never occurred to anyone that their Sunday work should be paid double time as well as time and one-half, since the subject has never come up before. The Committee was asked what they felt should be paid if New Year's Day had fallen on Sunday and we had worked. The Committee replied that double time is all that would have been expected; whereupon Mr. Millman pointed out that if the same reasoning was used in that case as now, they should expect the company to pay four times the regular hourly rate for New Year's Day had it been Sunday. Mr. Smith stated if the afternoon crew had known the company was not going to pay double

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

time and time and one-half for the extra eight hours worked in that week, they would have held out for the two hours which they unanimously waived; which evoked the comment from Mr. Hileman that it apparently was a case of "patriotism at a price." Both Mr. Hess and Mr. Smith stated that ninety percent of the employees in the shop felt both time and one-half and double time should be paid, and Mr. Hess suggested it be paid this time but a rider to the contract be attached clarifying this point. The Management was agreeable to a rider and one was suggested, but would not agree to pay the additional time and one-half for this one time. The Management did not feel a rider was necessary but in order to clarify this subject the following rider was suggested: "An employee shall not be paid both daily and weekly over-time for the same hours worked". The Committee preferred to consider this for a few days before making a decision.

Mr. Hess asked if it was true the Government would repay the company for extra expense of overtime work, to which Mr. Hileman replied that so far the Army had informed us we were to furnish them with a list of the expenses incurred by blacking out the plant and we would be paid "in due time" which might mean several years from now.

Mr. Hess asked if it was possible the plant would go on a seven day basis. Mr. Hileman stated

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

this was possible but we preferred not to do this since experiments in England and Germany both had proven that after a man has passed the fifty hour mark in a week's time the efficiency and morale drop so sharply that a fifty-six hour week is not advisable. If we were forced to resort to a seven day week, it would probably mean some sort of a staggering of shifts, allowing every man one day off sometime during the week.

Mr. Smith again brought up the subject of learners and remarked no provision was made in the contract for them and some misunderstanding was in the minds of these men regarding their increases. Mr. Millman again explained that a learner was not considered a permanent employee until he was transferred from the learner basis to the machine shop, at which time his number was changed and he was placed on the permanent pay roll. His seniority, as far as advancement in wages was concerned, dated from that time. However, Mr. Millman agreed to prepare a rider for the contract and also remarked he would draw up an agreement which would explain this situation, to be signed by all new learners. He believed the men who were hired as learners failed to understand this situation even though he tried to explain it as clearly as possible. The usual thought in the mind of a new man is "I have a job", and the other information that is given to him at that time is more or less lost in the excitement of the new

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

job. He believed that an agreement listing the procedure for learners would clarify the situation.

Mr. Millman brought up the subject of men arriving late to work, and pointed out that a man who checks in his time card at three minutes after seven, or the beginning of shift time, will probably be from five to ten minutes late getting onto the job since he must visit the locker room before reporting to work. Mr. Millman informed the Committee the Accounting Department had been overlooking the late arrivals and crediting them with the full eight hours worked, but if the practice continued a man would be docked fifteen minutes every time he was late. The Committee was reminded that our time is figured on fifteen minute basis and the company could deduct fifteen minutes when an employee checks in late. However, we had not wanted to be this strict and had hoped the employees would appreciate this fact and make a concerted effort to report on time.

Mr. Millman then brought up the subject of the new Boromatic machine and stated the machine had been here a couple of months now and studies made by the Time Study Department indicate a rate of 97c an hour was equitable. Mr. Hess replied this would be all right with the Committee, but if this machine was worth 97c an hour, it was felt the Thread Grinders were worth more. Mr. Kearns disagreed because the Boromatic op-

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

erates to three-ten thousandths while the Thread Grinders have three and one-half thousandths tolerance.

Mr. Kearns warned the Committee about the visiting and talking that is going on in the shop during production time, and warned them if this continued it would be necessary for the company to issue a ruling that permission must be received from the Foreman before a man would be allowed to leave his machine for any reason.

Mr. Fary also brought up the subject of the identification badges which should be showing on the employee's outer clothing when he comes through the gate. There are times, especially when a man is almost late, when they have to dig into their pockets or inside clothing to produce their badges, and such a procedure will probably make them late when punching in.

Mr. Millman asked the Committee what they would think of the idea of fingerprinting all employees. He stated that within a short time the Government would require this fingerprinting, and we were now about the only aircraft or aircraft parts manufacturer on the coast who were not fingerprinting their men. The Committee was enthusiastic in their approval of such a plan and Mr. Millman informed them plans are to be made for fingerprinting everyone within the next few weeks.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-WW—(Continued)

The subject of a different colored badge for each department was brought up by the Management and the Committee felt this would be a good idea since it would indicate at a glance where a man belonged, and if he was out of his department it would be immediately apparent. The thought behind Management's proposal was that the badges would be of a celluloid nature with a clip and carry only a department and individual number rather than the picture. When fingerprints are made an identification card bearing the employee's print and picture will be issued for identification.

Mr. Millman informed the Committee that furniture for the girls rest room had been ordered but it would probably be a week or more before receipt of same. On order is a couch, two arm chairs and a table.

There being no further business, the meeting was adjourned at 5:15 p. m.

/S/ P. D. HILEMAN
For the Company

/S/ IRVIN HESS
For the Alliance

RESPONDENT'S EXHIBIT No. 1-XX

Minutes of a special meeting called by the Management with the Executive Committee of the Pa-

(Testimony of Clarence L. Millman.)

cific Motor Parts Workers Alliance, at 3:30 p. m. Wednesday, February 4, 1942. Mr. Hileman was unable to attend. Mr. E. E. Dunn was introduced as a guest of the Committee.

Mr. Millman opened the meeting with the remark that he had called this special meeting to acquaint the Committee with several things which were coming up in the near future; the first being the nation-wide change of time which was to take place February 9th. He informed the Committee it was planned to move our clocks ahead one hour at 11:00 p. m. Sunday night, and that the third shift employees would report at 11:00 p. m. standard time, which would really be midnight under the new war time. He explained by changing our clocks at this time we would then avoid any loss of production, which would happen if the time were changed sometime during the operation of the third shift. The Committee agreed that this was the preferable method of effecting the change of time.

Mr. Millman then announced a proposed vacation plan for this plant, touching upon the important subject of production and the efforts being made to avoid any loss of productive time. He informed the Committee the company was of the opinion that vacations should be taken and not worked for the good of the employees, but since we were in such an emergency it was very likely that department heads or foremen would feel that some men could not be spared, and these men would be asked to forego their vacations and accept vacation pay. It was

(Testimony of Clarence L. Millman.)

proposed that vacation pay he held until December 1, 1942, at which time every employee entitled to a vacation and who had not received the time off, would be paid in cash the amount due him, based on his current hourly rate.

Mr. Smith asked if the men who preferred to work instead of taking their vacations would still have this option; to which Mr. Kearns and Mr. Millman both replied this decision would have to be made by the foreman.

Mr. Millman informed the Committee a questionnaire would be out within a few days informing each employee eligible for vacation how much was due him and asking for the time preferred.

Mr. Millman then informed the Committee plans were being made for a class in First Aid, to be conducted by one of our employees, Miss Catherine Minton, who is a certified First Aid Instructor. This class will be conducted in the lunch room two nights a week, probably Monday and Thursday and will consist of three hour classes for six weeks, or a total of thirty six hours. These classes will be open to employees and their wives who are interested, and it was urged that as many employees as possible take advantage of this course. At the completion of the course, all those people who pass it successfully will be issued the official Red Cross card and certificate.

Mr. Millman remarked also that permission had been granted the Air Raid Wardens in this locality to use the lunch room during the afternoons for

(Testimony of Clarence L. Millman.)

the purpose of conducting their own first aid classes. He pointed out men working the second shift would have the opportunity of attending these afternoon classes conducted by the Air Raid Wardens, and would receive the same certificates as those people attending the night classes.

Mr. Millman then informed the Committee that reports were being forwarded to his office daily showing the men who are habitually reporting late. These reports are being placed in the employees' personal records, and in the case of these men who are overdoing it, some disciplinary action will be taken. This notice was made merely as a warning to the members so they may take a little more care to report to work on time.

Attention was then called to safety films which were to be shown during the lunch hour on Friday, February 6th, in the new plant building.

Mr. Bebb asked that some attention be paid to the snagging wheel which was in a poor condition and which had broken on several instances recently, throwing sections of the wheel over an area of several yards. Mr. Fary informed the Committee that the Safety Committee had discussed this same subject at their last meeting a few days ago, and that plans had already been made to replace this snagging wheel as soon as one could be obtained.

Mr. Hess asked if employees on the third shift could be granted permission to take their thermos bottles of coffee on the job with them. They often had trouble keeping awake on this shift, and be-

(Testimony of Clarence L. Millman.)

lieved if they were allowed to drink their coffee on the shift they would have a better chance of remaining wide awake and on the job. Mr. Millman reminded the Committee that the thermos bottles would have to be opened for inspection at the gate if they were allowed to go into the plant, which would take several minutes more per man, and which would necessitate the men reporting for work earlier. Mr. Hess asked if the guard stationed outside the locker room could inspect these thermos bottles as the employees left the locker room; to which Mr. Millman agreed.

Mr. Baldwin brought up the subject of Mr. Max Rosenkrantz who was very much interested in getting a better job than that of janitor, which he new holds. Mr. Baldwin said he believed Mr. Rosenkrantz thought there was something being held against him personally, since he had not been advanced. Mr. Millman replied that he had talked to Mr. Rosenkrantz several weeks before and had told him that he was being considered for the next opening in the Steel Shed, but no one had been placed in the Steel Shed since that time, as the Committee was aware. Mr. Kearns reported there may be an opening in the Forge Department in the near future, and Mr. Rosenkrantz would definitely be considered.

Mr. Osborne asked that Mr. George McIntire, now operating the Flash Welding machine, be classed with the large electric upsetters. Mr. Millman replied that the flash welders had always been

(Testimony of Clarence L. Millman.)

classed with the small up-setters and that a 16c increase had been made in this rate on November 1st. At any rate, he could not agree to changing this rate until a thorough investigation of rates for like jobs in other plants had been made. Mr. Osborne remarked Mr. McIntire does the set-up work for both the flash welders, to which Mr. Kearns agreed.

Mr. Hess asked that Mr. Wm. Treff be classified as a Cylindrical grinder, to which Mr. Kearns replied he did not feel Mr. Treff was yet qualified to handle the varied amount of work on the Cylindrical grinders, and he believed Mr. Miller had informed Mr. Treff of this decision several weeks ago. However, he agreed to discuss the subject again with Mr. Miller and a decision would be made.

There followed a general discussion on the new draft regulations, in which Mr. Millman informed the Committee he was experiencing considerable difficulty in procuring extensions of Class 2 classifications, and the outlook was very unfavorable in that the Selective Service system was very carefully scrutinizing each Class 2 case and it was becoming increasingly difficult for employers to convince the Draft Boards that these men were indispensible. He remarked that the Selective Service system considered a man under 23 years of age could not very well be a key man because of his lack of experience. He also warned the Committee that it was very likely men with 3-A classification would be reclassified into 1-A, especially if their wives are working or capable of working. Mr. Millman told the group

(Testimony of Clarence L. Millman.)

that discussion was now in progress concerning an allotment plan whereby men with dependents taken into the service would allot a certain portion of their pay to their families, which amount would be equalled by the government. This would release men even with a wife and one child, for army duty.

There being no further business, the meeting was adjourned.

/s/ P. D. HILEMAN
For the Company
/s/ HOWARD BALDWIN
For the Alliance.

RESPONDENT'S EXHIBIT No. 1-YY

Minutes of a special meeting between the Executive Committee of the Pacific Motor Parts Workers Alliance and the Management of the West Coast Plant of Thompson Products, Inc., called for 3:30 p. m. Thursday, February 12, 1942. All members of the Committee and Management group were present, plus Mr. William Bright and Mr. Irvin Hess. Mr. Hess had asked to attend to represent Mr. Bright at the hearing.

Mr. Millman opened the meeting by asking Mr. Baldwin to state his reasons for calling the meeting. Mr. Baldwin said he did not feel the case against Mr. Bright as outlined in Mr. Millman's letter of February 9th, to the Executive Committee of the Pacific Motor Parts Workers Alliance, was suffi-

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-YY—(Continued)

cient reason for discharge, because of the general lack of information in the shop regarding the reasons for wearing badges. He asked what effect would be placed on the company if employees were not wearing their badges, and why this rule was put into effect. Mr. Hileman replied that the answer to this question should be obvious and he did not feel there was any excuse offered in this argument, since we had been wearing badges for a year and one-half, and everyone in the plant should have known by this time that it was a company rule and any case of an employee not wearing his badge was an infraction of the rule. Mr. Hileman informed the Committee that these were Army regulations which had been issued in March, 1940. Mr. Millman referred to the minutes of a meeting held on June 25, 1940, with the former Committee of the P. M. P. W. A., in which he outlined the reasons for the adoption of identification badges in this plant. Mr. Millman pointed out that it should have been obvious to Mr. Bright that this was a company ruling, since he had been here for some four years and during the year and one-half that we have been wearing badges he should have become aware of this rule.

Mr. Millman informed the Committee that they seemed to feel the reason Mr. Bright discharged was for one instance of not wearing his badge, but such was not the case, because several charges of failure to wear the badge had been reported, dating

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-YY—(Continued)

back to January 20, 1942, at which time the first report was turned into the Personnel Department.

Mr. Hess interrupted at this point to state that under the Union contract Mr. Bright had the right to recourse since he felt he had been unjustly discharged, and asked that Mr. Hileman be sole judge of the case. Mr. Hileman agreed that Mr. Bright did have right to recourse, but did not care to be the sole judge, and suggested that if an agreement could not be reached that arbitrators be appointed in accordance with the specifications of the contract.

Mr. Hess then produced a list which he had compiled during the day, of men who were not wearing their badges, and Mr. Overlander reported that he had come into the plant this morning without his badge, and that Mr. Bright had been admitted to the plant Monday morning without his badge.

Mr. Hileman, in order to review the case, remarked that Mr. Bright had appeared at the plant on Monday morning, February 9th, at 6:00 a. m., saying he had become confused with the time change, and had come to work an hour early. Mr. Hileman remarked that of all days in which a person would, in confusion, come to work early, this day was the least likely since it was the day the time had been changed, and the logical thing to do would be to report to work an hour late. Mr. Hess replied he believed he could answer for Mr. Bright's reason for reporting to work an hour early. He stated Mr. Bright had learned on Sunday that the

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-YY—(Continued)

C. I. O. had scheduled two meetings for our employees on Monday and that he had talked to Mr. Hess about it on Sunday. Mr. Bright had come to the plant early on Monday morning to contact the employees he knew who were to attend this meeting, and to attempt to talk them out of going. However, Mr. Millman informed the Committee Mr. Bright had told the guard he had become confused on the time and had come to work an hour early and asked to be allowed in the plant. The guard, wishing to let Mr. Bright in out of the cold, allowed him to enter the plant, but told him to remain in the locker room and not punch in his time card until 6:45 a. m. Mr. Bright interrupted at this point to say that the guard had said nothing to him about the locker room; whereupon Mr. Millman asked Guard Quillian to come to the Conference Room. Mr. Quillian reported that when Mr. Bright came to the gate with his story of having been confused and reporting an hour early, he had allowed Mr. Bright to enter so that he may come in out of the cold, had asked for his badge, which Mr. Bright had again left in his locker, and told Mr. Bright to procure his badge and bring it out to Mr. Quillian. Mr. Bright complied, but apparently this instance made no impression on Mr. Bright as he returned the badge to his pocket and was accosted a few minutes later in the plant talking to several employees, by Guard Lowe, who found him without his badge, told him to put it on, and reported the

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-YY—(Continued)

matter to Guard Quillian. Guard Quillian then entered the plant, found Mr. Bright and escorted him from the company property.

Mr. Bright stated these things were true, although he did not remember Guard Quillian telling him to remain in the locker room. He stated he did have trouble remembering his identification badge since he preferred to change from his working clothes to street clothes when leaving the plant, and was prone to leave his badge on his working clothes. He likewise stated he had been feeling ill and had the duties of his work on his mind and could not seem to remember to wear his badge.

Mr. Millman referred to the Monday morning incident and asked Mr. Bright why he had phoned back to the plant at 6:45 a. m., asking for Mr. Ballinger, and reporting to him that he had hurt his back and could not come to work that day. There had been ample opportunity for him to report to the Foreman that he would not be able to work while he was in the plant, and in any case, he could have asked for the Foreman or reported his inability to work to the guards, rather than calling Mr. Ballinger. Mr. Bright replied he realized the Foreman would be changing shifts at that time and he did not wish to bother them. Mr. Millman remarked that Mr. Bright was not having any back trouble when he returned to the plant at 1:30, although he reported that he was feeling bad.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-YY—(Continued)

Mr. Kearns asked Mr. Bright about the time he challenged Mr. Praed, the Timekeeper, to come out of the time booth and go outside with him on occasion of a disagreement. Mr. Hileman remarked that a man of Mr. Bright's age and stature was very much out of line in such a procedure considering the age of Mr. Praed. Mr. Hess stated that Mr. Praed was not feeling well and that the volume of work at the time booth was so great that Mr. Praed at times was inclined to be short or abrupt with the employees, and several employees had words with him. Mr. Hess asked Mr. Hileman if there were other complaints against Mr. Bright's work; to which Mr. Hileman replied there was not, that Mr. Bright's work was beyond *re-* reproach and the company had shown considerable confidence in him by considering him just about a month ago for a position as salesman with the Dallas, Texas, sales office of this company.

Mr. Millman referred to Captain Heliker's report of January 20th in which he stated the guards were having trouble with Mr. Bright regarding the wearing of his badge. Captain Heliker was called into the meeting at this time. He was asked by Mr. Hess how many times he would estimate he had had trouble with Mr. Bright on this subject; to which Captain Heliker replied he could recall four times on which he, himself, had reminded Mr. Bright of the necessity of wearing his badge. Mr. Hess asked if there were other employees in the plant with

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-YY—(Continued)

whom he had the same trouble. Captain Heliker replied there were some to whom he had spoken and to whom the other guards had spoken, but that none were habitual offenders such as Mr. Bright.

Mr. Baldwin asked how the Management could consider Mr. Bright's attitude bad when his work was satisfactory. Mr. Fary answered this question by stating that any man who disobeyed company rules, as Mr. Bright had done, could not have the right kind of attitude toward the company.

Mr. Hileman asked Mr. Bebb his opinion of the case and what should be done, but Mr. Bebb declined to express an opinion since he was not a member of the Committee, and was present only for the purpose of taking the minutes.

Mr. Hileman then asked Mr. Osborne, who admitted the charges against Mr. Bright but felt that the disturbance caused by his violation of rules would be a sufficient lesson to Mr. Bright were he reinstated. Mr. Miller stated he believed this was a misunderstanding and that Mr. Bright should be given another chance. Regarding the incident with Mr. Praed, he also verified Mr. Hess' statement that Mr. Praed apparently was unwell and was inclined to be a bit illtempered at times. Captain Heliker also spoke up to verify this statement, and remarked that the work in the time booth was of the nature that these employees were a bit harrassed at times.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-YY—(Continued)

Mr. Millman asked Mr. Bright about the report of February 7th in which Foreman Earl Boyer stated he had reprimanded Mr. Bright for spending too much time in conversation at each machine. Mr. Boyer was called into the meeting at this point, and stated that Mr. Bright had been spending from ten to fifteen minutes at each machine, on that particular date, and since Mr. Boyer felt that was far too much time needed for checking a job, he had reprimanded Mr. Bright. Mr. Bright remarked he did not care to answer since his word was being disregarded and disbelieved. Mr. Millman replied that the management was only giving him a chance to defend himself since he felt he had been unjustly discharged.

Mr. Bright then stated that he liked to learn why things were going wrong on the various jobs, and to try to ascertain what could be done to prevent this happening again. Mr. Hileman asked him if he was making notes on these things; to which Mr. Bright replied yes, and he reviewed some of the notes. Mr. Hileman asked if these notes had been turned over to Mr. Kearns, and Mr. Bright replied no, they had been reported verbally to the foreman. Mr. Hileman stated that notes, no matter how valuable, would be of no benefit to the company if they were not turned in.

Mr. Baldwin suggested that Mr. Bright's practice of making notes on the job should indicate his interest in the company. Mr. Hess asked the manage-

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-YY—(Continued)

ment if they would admit that Mr. Bright was a good worker, to which Mr. Hileman agreed, but stated that Mr. Bright had indicated his attitude was not that of the kind of employee needed to put out the best possible production. Mr. Hess asked if the management had tried to change Mr. Bright's attitude, to which Mr. Millman replied that they certainly had. He amplified this statement by reporting that nearly a year ago, while Mr. Bright was still operating the Acme Lathe, he had come into the Personnel Office one morning, threw down his gloves and said he wanted his check, that he was no longer going to work for this company and he would have nothing more to do with Otto Guenzler. Mr. Millman talked to Mr. Bright, called in Foreman Guenzler and Foreman Roy Long, and settled this dispute satisfactorily.

A little later on in the year, an opening occurred for Floor Inspector. Mr. Kearns recommended Mr. Bright because of his experience in the plant, and the job was given to him.

Around the first of this year, when Mr. James Creek, salesman for the Dallas, Texas, branch, was looking for an assistant, Mr. Bright was suggested and seriously considered. This job would have been a definite advancement and quite an opportunity for Mr. Bright, but Mr. Hileman reported that when Mr. Bright took it upon himself to come in and discuss the matter, some of the things said by Mr.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-YY—(Continued)

Bright at that meeting convinced Mr. Hileman that Mr. Bright was not the man for this job.

Mr. Hileman then asked Mr. Millman what his opinion was of the case; to which Mr. Millman replied he thought perhaps it might be wise to consider all angles for a few days before making a final decision, and suggested that the management make a decision by Tuesday, February 17th.

Mr. Kearns remarked that the Company was not trying to single out any one person, and asked the Committee if they remembered some time ago an announcement on the Bulletin Board regarding the employees washing up ten to fifteen minutes before lunch time. The Committee all agreed and Mr. Kearns stated that had the company wished to fire anyone for a single offense, they could have fired twenty men in the past three months for this one thing, and quite a few were men who had been with the company five years or more.

Mr. Hileman asked Mr. Bright and Mr. Hess if they knew of any plant with the privileges enjoyed by this one. Mr. Hess replied he knew of none, and he sometimes felt the management was too lenient with the employees. Mr. Millman agreed and stated this was the reason the management was going to crack down a little more and enforce some of the regulations which had been overlooked in the past, including the early washing up and visiting on company time.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-YY—(Continued)

Mr. Hileman stated it was quite apparent that very few people in this plant are aware of the seriousness of the situation in which this nation finds itself at this time. He pointed out that the annual income for the nation was 90 billion dollars a year, but the government was now spending 200 billion dollars a year for armament. He remarked that the only way to raise this money was by the issuance of bonds and by taxation, and that the sale of bonds was money on which interest must be paid, approximately 3½%, and that this money must come from somewhere. As evidence of the apparent lack of interest of our employees in the seriousness of the war situation, Mr. Hileman referred to the First Aid Class which had been scheduled to have its initial meeting the night before, and to which only eleven people came.

Mr. Millman told the Committee that a decision would be *re* reached by Tuesday, and suggested the meeting adjourn.

There being no further business, the meeting was then adjourned.

/S/ P. D. HILEMAN,
For the Company.

.....

For the Alliance.

(Testimony of Clarence L. Millman.)

RESPONDENT'S EXHIBIT No. 1-ZZ

Minutes of a meeting held between the Management representatives and the representatives of the Pacific Motor Parts Workers Alliance at 3:30 P. M., March 5, 1942. Guests of the meeting were Mr. Butcher and Mr. Wallace as temporary Committee man.

Mr. Millman opened the meeting with the statement that reports had reached the Management of certain union activity; namely, petitions, being circulated by various members of the Pacific Motor Parts Workers Alliance while attempting to perform their regular duties. He told the Committee the Management had no objection to any union business which might be conducted on the company property, but definitely would not tolerate any union activity on the company time. He pointed out to the Committee that the Company was paying these men for eight hours of productive work, and certainly did not expect the union members to conduct their business while receiving the company pay. He notified the Committee that the men whom the Management knew were doing this work had been told to cease and if it continued these men would be discharged at once. Mr. Baldwin replied that the Committee, too, had realized this should not be done and had taken steps to stop these men from circulating their petitions on company time.

Mr. Millman then informed the Committee that the Management had been advised by the Army

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

Procurement Office that they wish to be notified of any people who were suspected of deliberately slowing down production. He told the Committee the company knew of several individuals who were deliberately slowing down, apparently not with the idea of delaying production on defense parts, but merely with the selfish thought that if they work a little slower there will still be work remaining to be done on Saturday, or possibly Sunday, at time and one-half or double time. He told the Committee no report had as yet been turned over to the Army, but the Management was well aware of the men who were conducting this slow-down campaign and that unless it stopped immediately, the Army would be notified and the company would not be responsible for what action was taken by Army officials. This notification to the Committee is to serve as a warning to these men and it is hoped no further reports of slow-downs will be forthcoming.

Mr. Hileman informed the Committee this plant was shortly to be inspected by Army officials—not with the thought of spying on our men, but merely a routine inspection to ascertain what type of work we are doing. The company enjoys an enviable record with Army officials of the Western Command, and it is due to the good name the company has for cooperation, both on the part of employees and Management, that the Army officials wish to make this inspection and acquaint them-

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

selves with the plant and the people working in it.

Mr. Millman then referred to the minutes of a previous meeting in which the Management had agreed to investigate flash welding rates in the community with a view toward possibly adjusting our own rates. He reported that three aircraft companies, Douglas, Vultee and North American, have flash welders which are used purely in an experimental way, and one company pays their man 95c an hour as an technical operator and set-up man. The three companies definitely stated that were they in production they would not consider a rate any higher than 90c. The aircraft industry, as a whole, considers flash welding under spot welding, which carries a rate from 75c to 85c an hour. One company flash welding heavy oil drums pays a top rate of 77c an hour after six months, but has an incentive bonus system which enables the operator to earn upwards to one dollar. However, as soon as all the data has been collected on what our flash welders can do and how fast, the company will begin to receive flash welding work from outside organizations, such as the larger aircraft plants, and because of the fact that the operator on this machine is in for complicated experiments in the near future, the Management is agreeable to increasing this rate to one dollar, but again impresses the Committee that it is out of consideration of the new work coming up that this increase is made and it is expected no further increase will be asked for quite some

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

time. The increased rate on this job will be effective March 16, 1942.

Mr. Millman then again referred to the minutes of a previous meeting concerning the electric truck. He reported an investigation of several different types of industries showed that a glass company paid 88½c for this work, aircraft companies paid from 60c to 80c, a paper company 80c, a metal trades company warehouseman 75c, stockman 70c. He pointed out our rate was now 86c. Mr. Baldwin argued that the operators in other plants do not load their platforms but merely haul the loads from one spot to another, whereas, our truck operator does his own loading, is handicapped by the lack of clear passage-ways in some departments, and performs other work during the times he is not running the truck. Mr. Kearns replied this was reasonable since there was not enough work for a truck driver only. Mr. Millman asked the Committee if they felt this job was worth as much as a commercial grinder's job, and Mr. Baldwin replied that it was in it's own way, because quite as much skill and knowledge was required to run this truck and to know where, when and how to transport the stock through the plant. He stated he was well aware of what operations truck operators in other plants do, and that in every case they have helpers who do the loading and stacking. Our trucker merely presses the button and guides the

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

truck to the designated spot. Mr. Hileman admitted the employee operating this truck was an exceptional man, and would be agreeable to setting a rate equal to that in the Cleveland plant, of 90c, but the management would expect the Committee to handle any complaints from other jobs which might arise. This rate was being granted only in view of the fact that the operator performed other jobs while not running the truck.

Mr. Millman suggested that a rate be set on a wiper for the flash welding room. He noted the fact that valves and steel must be wiped thoroughly clean before flash welded, and that it was now necessary for flash weld operators to take time out from their welding work and wipe off this steel, or else a man earning 90c or 95c an hour would be called to wipe this steel. He suggested setting a rate for wiping of 75c and hiring a man for this job alone. Mr. Baldwin replied this would be agreeable, but not if the flash welders were forced in slack periods to resort to doing some more unpleasant job in order to allow the wiper to continue working. Mr. Hileman asked if there was enough work for the flash welders to have a man steadily doing this work now; to which Mr. Kearns replied there was not, but all indications pointed to a greatly increased volume of work for our flash welders which would require a steady man on this wiping work. Management assured the Committee that it was only desired to have a rate set for this work so that no argument

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

would be had when it was necessary to hire a man full time. The Committee was agreeable to setting this wiper's rate of 75c.

Mr. Hileman remarked it was becoming increasingly necessary that the Management attempt to keep the costs down. He referred to recent letters which have been received from some of our biggest customers, the Commings Engine Company, General Motors Truck Corporation, Worthington Pump Company, etc., notifying the company that prices on Diesel Engine parts were frozen as of October 1, 1941. The Management was not notified of this until the early part of February. This means that regardless of the increase in our labor or matirial costs, we could not increase the price of our valves for Diesel Engines. Mr. Hileman produced a letter from the Waukesha Motor Company under date of February 6th, which says in part: "Under date of December 6, 1941, we received a letter from the Office of Price Administration, signed by Mr. Leon Henderson, advising us that there would be a meeting held in Washington during December to discuss prices of Diesel Engines. It also stated that prices were frozen as of October 1, 1941, until such time as this meeting was held, and requested that if any increases had been made since that date, that they be rescinded. This meeting was attended by Mr. DeLong, the President of our company, and myself, at which time the Office of Price Administration advised the manufacturers that prices would remain

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

frozen as of October 1, 1941". The letter further stated and concluded with "on future prices of any new parts or any specials that we may have it is necessary for us to establish these prices on the basis of October 1, 1941. We, therefore, would request that in any price quotations you make us on redesign, specials or new parts that you would *us* your costs data and method of estimating that you would have used on October 1, 1941."

Mr. Kearns then brought up the subject of the Douglas bolts which are now being turned on Warner and Swasy 3-A turret lathes, reporting that this was a simple job of turning the hex and radius and certainly not worth the 3-A turret lathe rate of $1.01. He would like to set a rate of 91c and class this operation under Production Hand Screw Machines, except that it be performed on the Warner and Swasy 3-A. One of the new lathes which was recently received would be designated for this job and would do nothing else. Mr. Millman pointed out this was a case of saving the company some money and does not cut anyone out of any work because the 3-A operators would then be free from this tedious bolt work to continue on their bar stock production, which was a skilled job and worth more money. It is merely a case of classifying this one Warner and Swasy 3-A as a Production Hand Screw Machine because of the simple type of work done on it.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

Mr. Butcher asked if this would be fair to other Production Hand Screw Machine operators, since this man, after a year's experience in running the Warner and Swasy 3-A, could be classified as a skilled turret lathe man. Mr. Kearns replied he certainly would not be considered a skilled operator since he would be doing only one job and one set-up. The other operators of the Warner and Swasy #3 machines do a varied type of jobs and are versatile in their set-ups. This was merely a case of a Production Hand Screw Machine operator running a Warner and Swasy 3-A. The Committee was agreeable to this rate as long as the machine would do only the bolt turning job.

Mr. Millman then said these items were the only ones the Management had to discuss at this time and suggested that Mr. Baldwin continue the meeting.

Mr. Baldwin brought up the subject of the vacation plan as announced a few weeks ago, at which point Mr. Millman interrupted and stated he would like to read the announcement which he had prepared on vacations for the Committee's approval. This announcement, he said, would be distributed within the next day or so. At the conclusion of the reading, Mr. Baldwin stated the members of the Pacific Motor Parts Workers Alliance preferred to have their vacation pay at the time the vacation was requested, in the cases where the Management asked the employee not to take the time off, in-

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

stead of having to wait until December 1st. Mr. Millman replied that it had been thought the employees would prefer to receive this money on December 1st in order to give them extra money for Christmas and to prepare for their 1942 income tax return, which would be considerable. However, Mr. Hileman stated he could see no serious objection to preparing the employee's vacation check at the time his vacation is requested if he was unable to take time off.

Mr. Baldwin also asked that the employees be notified at least two weeks in advance of their vacation starting date, whether or not vacation would be granted, to which Mr. Millman replied this was rather difficult since it could be easily understood that a situation might arise within one or two days before an employee's scheduled vacation, which would make it impossible for the Management to grant time off. However, the Management would agree to prepare the vacation pay at the time the employees requested his vacation, and they would sincerely attempt to give a man a definite answer at least two weeks before his vacation falls due.

Mr. Baldwin stated the members of the Pacific Motor Parts Workers Alliance understood that all vacations might be cancelled by the Army at any time, and would not be unreasonable.

Mr. Kearns remarked he would like to have it definitely understood that in the case of a greater emergency than we now face, vacations very likely

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

would be cancelled, to which Mr. Baldwin agreed, but suggested it might be that arrangements could be made for this particular employee or employees to set another future date for their vacations, which was agreeable to the Management. Mr. Lloyd asked if it was necessary for a man to take a vacation if he does not want it, and Mr. Millman replied the Management preferred all employees to take the vacation due them since so few men had had time off the previous year and this undoubtedly would be the last year for several to come that vacations could be granted, both because of the urgent demand for production and the lack of transportation facilities, which will become increasingly severe. Mr. Baldwin suggested that some men might prefer to work in the interest of increased production to taking the time off, and Mr. Hileman agreed the men would be given their choice in the matter. However, if the Army should cancel our vacations the Management wishes to have it understood the vacation pay will still be given on the date vacation was requested and not all at one time, since it would not be possible for the Management to pay out three or four thousand dollars in one month for vacation pay.

Mr. Baldwin asked if it would be possible for the company to pay every other Friday, instead of the present set-up of the 5th and 20th of the month. Mr. Kearns asked Mr. Baldwin if he realized the confusion this would cause in the Accounting De-

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

partment. Mr. Baldwin replied that the confusion caused there would be no more than the confusion now caused in the shop resulting from the method in which the employees' overtime is figured. Mr. Hileman asked the Committee if they would stop for a moment and analyze the pay situation. He remarked that our present pay days on the 5th and 20th pay the employees up to the first and fifteenth, respectively, but that if pay day was held every other Friday it would be necessary to hold back a full week's pay. Under the present set-up not over two or three days are held back, because if the 5th falls on Sunday the employees are paid on Friday the 3rd, and only two days pay is held back. Mr. Millman pointed out that all job production costs are priced as a unit and all hours worked are charged to the individual job. Under our present set-up there is no carry-over on accrued pay at the end of the month, whereas under the proposed set-up the last pay day might be on the 25th of the month and before the Accounting Department would be able to close their books and determine the cost of the jobs completed for that month it would be necessary to again figure another pay roll on the end of the month in order to have the cost of wages due and not yet paid. The Management was unable to see any valid reason for this request, and felt that the reason given by the Committee that the employees were not able to budget their finances

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

sufficiently to carry them over a fifteen day period was insufficient.

Mr. Baldwin suggested we let this matter rest for the moment and go on to the next request, which was to have the checks for the second and third shifts furnished on the evening of the fourth, so that these employees would not find it necessary to call at that plant on the morning of the 5th to receive their pay checks. Mr. Millman replied the Management realized that the second shift was forced to make a special trip to the plant or else not receive their checks until the day after pay day, and agreed that with the present and future shortage of rubber it would be well to eliminate this extra trip. He referred to a calendar, pointing out the situation arising when a pay day, the 5th, occurs on Monday. Under the proposed agreement, it would be necessary for the Accounting Department to have the pay checks ready by noon on Saturday, the 3rd, which would only give them two and one-half days to prepare this pay roll. He asked the Committee if the membership would agree to give the company one extra day by setting the pay days to the 6th and 21st, and agreeing to have the pay checks of the second and third shifts available on the evening of the 5th and 20th. He pointed out that for the one period in which the change-over was made; for instance, the present period if we paid on the 21st, it would mean that one extra day would appear between pay days but

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

after that they would bee the same number of days apart that they now are. The Committee believed this would be agreeable with the men if they were able to receive their checks the night before. Mr. Baldwin suggested that the Committee might be willing to drop the matter of pay days every two weeks if the Management would grant this request of furnishing the night crew's checks on the day before pay-day to which the Management agreed.

Mr. Millman suggested that a chart be prepared showing the definite days for the remainder of the year on which the employees would be paid, and suggesting that in the cases where the pay day falls on Monday, in those cases the night crews would have to wait until the next day for their checks.

Mr. Baldwin then brought up the matter of the benefit fund which the employees in the factory wished to organize. He asked that the dues for the benefit fund be deducted from the pay checks. Mr. Millman asked if it was not possible for the benefit fund administrators to set a serious enough penalty on the people who were lax in making their benefit fund payments, but Mr. Baldwin felt it would not be possible to satisfactorily enforce any such voluntary payments and the Committee very strongly urged the Management to consider the deductions. Mr. Hileman remarked that the deductions now granted the employees were increasing so rapidly that it was becoming necessary

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

for the Accounting Department to consider a new type of check with a larger stub on which to list these various deductions, and did Mr. Baldwin think the benefit fund administrators would be agreeable to imbursing the company for the extra time required to set up and make an additional deduction from pay checks. He suggested a possible amount of $10.00 a month as reimbursement for this deduction. Mr. Baldwin replied he believed this would be agreeable with the administrators of the fund and would talk it over with them. Mr. Wallace concurred with Mr. Baldwin's thoughts, Mr. Wallace being a member of the Administrative Committee of the benefit fund.

Mr. Baldwin then brought up the subject of the rate on the operators of the cut-off machines in the steel shed. Mr. Millman reminded Mr. Baldwin that this job carries the same rate as the polishers, and the polishing work was a more sensitive job than the handling of the steel. Mr. Baldwin replied the steel shed operators had the responsibility of cutting the steel correctly and finding the right type of steel for the jobs as called for. Mr. Kearns disagreed on this statement and reported this was Mr. Rattleman's responsibility and not the responsibility of the Shear operators. The Management was not very receptive to this suggestion of increasing this rate, but asked a little time to review this situation and survey the job, which was agreed to by the Committee.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

Mr. Baldwin then referred to the grooving lathes now being operated by Mr. Butcher and Mr. Spencer, and suggested that Mr. Butcher give his thoughts. Mr. Butcher stated he felt this machine should carry the same rate as the Special Screw Machines, since they were doing work which required a closer tolerance than a good deal of the work now being performed on the Special Screw Machines. Mr. Kearns agreed to this suggestion, and remarked that the scrap content from this operation was very low. It was agreed to reclassify the grooving lathe with the Special Screw Machines.

Mr. Baldwin then referred to the Acme lathe rate, which he felt was low. Mr. Osborne stated that some operators on the machine doing tubing had stepped up production considerably, to which Mr. Kearns replied that this certainly should be the thought uppermost in any operator's mind. He remarked that this lathe was only doing tubing and valve seats and certainly was not as skilled as the Warner and Swasy 2-A and the Lodge and Shipley lathes. Mr. Millman remarked this machine was to be replaced and that the replacement machine would not do any tubing work and the operators now on the Acme would do the regular work for the Warner and Swasy 3-A.

Mr. Baldwin asked again about the learner program, and felt that the Management should set a definite maximum time on which a new man would

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

be held at the learner rate. Mr. Millman pointed out there was only one case in the plant where a man had gone over 30 days on the learner basis, and there were several instances where employees who merited it were transferred to production in much less than 30 days. However, he suggested setting a limit of 60 days, at the end of which time the learner would either be transferred to production or would be discharged. He likewise agreed to notify the learners in writing the effective date of their transfer to production, so they might be perfectly certain as to when their automatic increases would begin.

Mr. Miller brought up the subject of gloves and suggested that on the jobs which require gloves they be rationed so many pairs a week. He said the tubing operations in the Forge Department require a pair of gloves a day but felt that two pair a week per man for the Forge Department would be quite sufficient. The Management agreed there were several jobs which would require gloves, and suggested that the Management could furnish a specified number of gloves per week per job and that all other gloves would either be purchased for cash at the stock room or from some outside source.

Mr. Baldwin referred to the girl who is now working in the time booth and complained that it was not fair for her to be working straight days, being the newest person there. Mr. Millman informed the Committee this job is being classified

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

by the Industrial Welfare Commission as an office job and that it is permissible for female employees to rotate and work the night shifts on this job. He told the Committee Miss Neal would be notified of this decision at once.

Mr. Baldwin then asked if it would be necessary for a man to lose his 5c second shift premium if he wished to change with a day man for a week. Mr. Kearns replied he had many requests from men wanting to change to get back on days for a week or so because they were tired of working steady night shift. It was pointed out to the Committee the bonus was paid on this shift because the Management realized it was some inconvenience working nights and that the employees should take this into consideration before deciding they want to work this shift steadily. The Management expressed the opinion that if any relaxation was made on this ruling the shifting of employes would be greatly overdone, but suggested each case be considered on its individual merits, and if it were necessary for a steady afternoon man to shift to days for a valid reason, the request could be granted, but if any excessive shifting takes place the whole thing must stop at once.

Mr. Osborne suggested a Class A and Class B heat treating rate in order that the men classed as heat treater's helpers might be reclassified as heat treater Class B instead of going directly to heat treater Class A, since it was obvious that there was

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-ZZ—(Continued)

considerable to learn about heat treating before a man could become a Class A heat treater. Management requested time to consider this suggestion, which was agreed to.

Mr. Baldwin asked that the Management make a rate survey on Mr. Chorley, Mr. Wilks and Mr. Rich. Mr. Millman replied these men would be considered when the routine review of wages was made prior to the beginning of the next pay period.

Mr. Hileman asked if employees were satisfied with the lunch service as being provided by the DeLuxe Box Lunch Company, to which the Committee replied the day shift lunch service was very satisfactory except for a few days when the food was sent out cold, which was reported to Mr. Millman and corrected at once. Mr. Miller remarked the food on the swing shift was very unsatisfactory —that the coffee and chili and tamales were usually not of good quality. Mr. Millman promised he would contact the lunch company and arrange to have some improvement made, and also notified the Committee the DeLuxe Company had agreed to set up a coffee urn which was now in the lunch room awaiting connection with the gas line. This would then provide fresh hot coffee for all shifts.

There being no further business the meeting was adojurned.

/S/ P. D. HILEMAN
For the Company

/S/ HOWARD C. BALDWIN
For the Alliance.

(Testimony of Clarence L. Millman.)

RESPONDENT'S EXHIBIT No. 1-AAA

Minutes of the Labor Relations Council held on Thursday, April 9, 1942. Messrs. P. D. Hileman, W. J. Kearns, C. L. Millman represented Management, with A. F. Anderson as a guest; and H. C. Baldwin, F. W. Osborne, A. R. Miller, J. L. Lloyd, L. P. Wallace represented the Pacific Motor Parts Workers Alliance, L. S. Bebb as Secretary, and Geo. Spurlock and Fred Nichols, guests.

Mr. Millman opened the meeting with the remark that after last meeting the Accounting Department had made a sincere effort to have the pay checks for the night crews prepared by 5:00 p.m. on Friday, and had spent two evenings working to get these checks ready. He reminded the Committee they had asked for the checks for the night crews the night before the regular pay day in order to save these men a special trip to the plant to pick up their checks. He informed the Committee that at least twenty-five percent of the third shift appeared at the plant at 5:00 p.m. to pick their their checks, and since the only reason for having the checks ready at that time was proven ineffective, the Management did not feel it necessary that the Accounting Department work overtime to prepare the checks.

Mr. Baldwin then remarked it seemed the only solution was to return to the question of paying regularly every two weeks, so employees might have their pay checks before the week end and so there

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

might be no misunderstanding about what overtime payments were included in each check. Mr. Millman reported the Accounting Department and the Plant Controller had investigated this procedure very thoroughly and had indicated their willingness to pay in this manner. He stated that if such a method of payment was resorted to, the pay on Friday would cover the two weeks preceding and ending at midnight on the Saturday before pay day. In other words, if the first Friday pay day was scheduled for April 17th, this pay check would include all hours worked from the beginning of the last pay period to and including the afternoon shift on Saturday, April 11. Mr. Millman suggested that we could start with our first Friday pay day on April 17th, and this check would be slightly smaller than the average check since it would cover but eleven calendar days, but the employees would be receiving a check approximately four days earlier than usual. However, the first pay day could be extended to April 24th, four days later than usual, and would include all hours worked from April 1st to April 18th. The Committee believed it was advisable to begin this pay system on April 17th, which was agreeable to the Management. Mr. Hileman made the statement, however, that under no circumstances would any employee's pay check be made available before the specified pay date, since the work required to single out one or two checks and rush them through, meant too much additional

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

work for the Accounting Department, and it was believed by the Management if the employees knew for a certainty that their checks would be ready every other Friday, they should be able to plan far enough ahead to forestall circumstances which might cause them to want their checks earlier than the regular pay date.

Mr. Baldwin asked if it would still be possible to obtain the checks for the night crews on Thursday night, to which the Management replied that it would not, since the last experience had proven that apparently the employees were not as much concerned with saving their tires by not making a special trip to the plant for their checks, as they were in receiving the money at the earliest possible moment.

Mr. Spurlock interrupted at this moment with the suggestion that he believed that majority of employees would ordinarily spend more time driving around on pay day than necessary, regardless when their checks were received, and said he felt from experience that the most complaints came from the fact that it was often necessary to wait an hour on pay day morning at the gate for the checks. He suggested if the checks were available in the Personnel Office at 10:00 a.m. every pay day and it was not necessary for the employees to wait in line to receive them, this would be satisfactory. Mr. Millman explained the reason for this delay was that when the checks were delivered to the Personnel

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

Office he immediately distributed them to the employees who were waiting, then went to the machine shop and distributed the pay checks to all employees working day shift in order that they might have the checks available for cashing at the bank during the lunch period. It usually took from one-half hour to forty-five minutes to accomplish this distribution, and all employees who had come to the gate between the time the first distribution was made and the time the distribution in the plant was completed were forced to wait.

Mr. Wallace suggested the Personnel Office contact the timekeeper's booth and receive a list of all employees working the day shift, remove these day shift employees' checks from the group and deliver them to the foreman who could distribute them through the plant. The remaining checks for the afternoon and night crews to remain in the Personnel Office for distribution at the gate as employees called. This was quite agreeable to Mr. Millman, and it was decided this procedure would be followed.

Mr. Baldwin reported he realized the confusion in the Accounting Department when the checks from last pay day were furnished to the night crews the day before, and wished to offer his thanks and appreciation to the Accounting Department for this extra work.

Mr. Millman then informed the Committee they probably realized it had always been the company

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

policy that an employee who quits, or is discharged for cause, automatically cancels all vacation rights, but that there was apparently some misunderstanding in the shop, since the three men who had recently left the company were somewhat bitter because they company did not pay them for their vacation when they left. Mr. Millman explained that in the beginning vacations were granted voluntarily by the Management without pressure from the Union, and that the West Coast Plant of Thompson Products, Inc., was one of the first on the West Coast to grant vacations to hourly paid employees. Vacations were paid as a bonus in recognition of continued service with the company and it was thought than an employee who no longer wished to worked for Thompson Products should forfeit his seniority and vacation rights. Mr. Baldwin and Mr. Wallace both expressed the opinion that vacations should be a bonus for past service and that a man who was discharged or resigned still was eligible for this pay. However, Mr. Wallace believed that if the employees were well informed on this point, or if it was included in the contract there would be no complaint. Also, he pointed out, an employee could take his vacation and then hand in his resignation, to which Mr. Hileman replied this was true, but if an employee resorted to this method of getting his vacation he could be sure that he would never again be eligible for rehire by this company.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

Mr. Hileman suggested that the management pay the vacation pay for the three men who had resigned, since the company policy on this point was not clear at that time, but that the contract be reworded so that there will be no future misunderstandings. The Committee felt that this would be agreeable and Mr. Nichols remarked he believed, as Mr. Wallace and Mr. Baldwin, that vacations should be predicated on past service rather than future service; but he admitted he knew of no other company who paid vacation bonuses to employees who left, and believed this would be satisfactory if explained thoroughly to all employees.

Mr. Baldwin then agreed, for the Committee, to this change in the contract, but suggested that, since the Committee was agreeing on this point, the company should consider changing the vacation deadline date to make vacations available one year from date of service. Mr. Millman agreed to take this subject under consideration and would bring it up in the next meeting. Mr. Baldwin remarked the Management continually referred to other existing contracts in their dealings with the Committee, and suggested it only fair that the Management agree to consider other contracts and their clauses when reviewing requests by the Committee.

Mr. Hileman then referred to the current vacation schedule, pointing out that April, June and July were peak months and that if the great number of vacations were permitted during these three months

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

the vacation expense for those particular months would be all out of line and he hoped that we might work out a plan whereby vacations could be scheduled later on during the season in an attempt to equalize the vacation expense and lower the peak months of April, June, and July, and raise the low months of May, August and September.

It was explained to the Committee that the Company is now operating on a budget plan whereby a certain amount is specified each month to be used for the purchase of machinery, miscellaneous equipment, wages, vacations, etc., and the Management hoped to be able to stay within this budget. The fact that the majority of the vacations had been requested for April, June and July, would cause these three months to show a far greater expenditure for vacation pay than was allowed in the budget. This would, of course, be made up in a later month when the amount of vacation pay was not as great as that allowed but it was preferred, if it could be done, to keep within the specified amount of vacation pay.

Mr. Millman suggested that he talk to the employees requestng vacations in these peak months and see if they would be agreeable to taking their second choice according to seniority. In other words, to employees requesting vacations in June, if it was necessary because of expense, to ask one of the employees to postpone his vacation for a short time, the employee with the least seniority

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

would be asked to make the postponement. He also asked the Committee to again impress upon their members that it was necessary to give the Personnel Department two weeks notice when they wish to change their vacation date, since every vacation request meant an approval by Mr. Kearns and a notification to the Accounting Department at least a week and a half ahead of the new date of the vacation, and that the Management had agreed to try in every case to notify an employee two weeks ahead of time whether or not the vacation had been approved. This was quite agreeable to the Committee.

Mr. Millman then remarked that the Management felt, through their studies of other plants, that the oiler rate was not in proportion with other rates in the plant and suggested a lower rate be set on this job, possibly 85c. It is suggested that the man doing the oiling work be transferred to a Maintenance Department job since this department is in need of more help, and the man now oiling is thoroughly experienced in our plant. It is expected to transfer or hire another man for the oiler job. It was pointed out that this did not mean a demotion or a cut in rate for any man, but merely a leveling off of certain jobs, which in the beginning had been temporary or part time and had now evolved into permanent jobs. These jobs, and this one in particular, were being paid for at a higher rate than they were actually worth.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

Mr. Baldwin remarked that this brought up a point the Committee had in mind, that of a job evaluation in the shop. He believed it would eliminate considerable argument and discussion regarding the relative importance of one job against another, and might work for more harmonious relations among employees and Management. Mr. Millman agreed this was an excellent idea, and one which he had given some serious study, but had found that to completely do this job, it would require three or four months work, and he had found it impossible to sit down and work it out alone. Mr. Baldwin suggested that a committee be appointed by the P. M. P. W. A. to work on this subject.

Mr. Spurlock brought the conversation back to the oiler rate and asked why not let each machine operator oil his own machine. Management pointed out that at one time this had been done, but in the cases of the men who were lax or failed to oil the machine and it burned out a few days later, there was no one on whom the responsibility could be placed. By having one man designated for this job, the Superintendent could be absolutely certain it would be done correctly.

Mr. Baldwin stated that since the Management felt the oiler rate was too high, he had one which he thought was too low—that of the Steel Shed. He believed the job is as skilled as the flash lathe. Mr. Millman pointed out that the Steel Storage job

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

did not carry the responsiiblity that other jobs in the plant carry, since there was direct supervision available at all times, whereas a machine operator is required to make his own set-ups and is not supervised as often as the steel shed machines. Mr. Baldwin replied this was true, but the work was considerably harder out there; to which Mr. Millman, answered, in a machine shop wages were paid according to the skill required and not the physical effort. Mr. Baldwin agreed with this.

Mr. Hileman asked how many hours were being worked in the Steel Shed, and Mr. Kearns replied forty-eight hours a week. Mr. Hileman then stated that if this rate was raised it would probably be necessary for the Management to revert to four shifts averaging forty hours per week, since we could not afford to pay higher wages for this work. He informed the Committee that the Army was continually suggesting and requesting that our plant go on a four shift basis, but the Management was attempting to avoid this arrangement unless absolutely necessary, because of the fact that overtime would be almost completely abolished. Mr. Spurlock remarked that the principal objection to this work seemed to be the smell of the radiac machine, but he frankly does not feel the job is worth the money now being paid.

Mr. Nichols remarked that the oiler gets $1.03 an hour for steady days while it is necessary for him to work on his commercial grinding job steady

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

nights to make that rate. He does not feel that the oiler job should pay that much since he could do the oiler job, as could any other commercial grinder operator, whereas the oiler could not do any of these grinder jobs. Mr. Kearns replied this was true, and was also true in the case of the Steel Shed.

Mr. Baldwin again referred to the job evaluation and asked if we didn't think the Steel Shed rate was worth 5c more than the oiler rate, to which Mr. Hileman replied, as he stated before, we feel 85c on the oiler job is sufficient, but will go to 90c if the Committee insists.

Mr. Millman suggested that he make a new survey of rates being paid for shear operators throughout the community, and to reconsider the job at the next meeting. It was agreed to set the oiler rate at 90c.

Mr. Baldwin then brought up the subject of seniority of men brought into the plant from other plants of the company. He reported that the majority of employees felt a man who was transferred to this plant, regardless of the number of years of seniority with the company, should begin in this plant as a new man as far as job seniority is concerned. It was expected that he would retain his company seniority as far as vacations and Old Guard Service are concerned, but that he must build his job seniority in this plant. Mr. Baldwin remarked that this was designed to prevent the

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

management from transferring men from other plants to this plant to fill the higher paying jobs instead of advancing the men now working here. Mr. Millman asked if this had happened in any case, to which Mr. Baldwin replied that it had not, but the Committee was looking to the future and as we grow there is a possibility that the Management might resort to transferring men from Cleveland. Mr. Millman remarked that this was extremely unlikely, and, if anything, it would be the other way around with us transferring skilled help to Cleveland, since with the new TAPCO plant operating the employment departments of the Cleveland plant were extremely hard pressed to find any type of skilled help. Mr. Baldwin then reviewed the suggested clause to be inserted in the seniority agreement, but the Management asked for a little time to consider the effects of such a movement before making any decision.

Mr. Baldwin then remarked he felt the head polisher should carry a little higher rate than the other polishers, since the responsibility of turning out the right kind of work and arranging the work schedule of the polishers on each shift rested with the head polisher. Mr. Kearns remarked he had been considering such a plan for quite some time and was fully in accord with this suggestion. The Management then agreed to a 5c higher rate for the head polisher.

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-AAA—(Continued.)

There being no further business the meeting was adjourned.

/S/ P. D. HILEMAN
For the Company

/S/ H. C. BALDWIN
For the Alliance.

RESPONDENT'S EXHIBIT No. 1-BBB

Minutes of the Labor Relations Council held on May 19, 1942. All members of the Pacific Motor Parts Workers Alliance Committee and the Management group were present, and Mr. J. H. Waddell and Mr. Bud Marshall appeared as guests of the Committee.

Mr. Millman opened the meeting by referring to a previous meeting in which the possibility of setting a rate for Class B Heat Treater was discussed. He suggested a maximum rate of $1.05 on this job, which would be 2c higher than the minimum rate on Class A. Heat Treater, and 10c more than the maximum rate on Heat Treaters' Helper. This was quite agreeable to the Committee, and it was decided to make a rider to the contract covering this rate.

Mr. Millman then reviewed the California labor laws concerning the hiring of women, and pointed out that in order to place women on factory production jobs between the hours of 11 p.m. and

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

6 a.m., it was necessary to obtain a permit for each individual girl from the Industrial Welfare Commission, which permits were extremely difficult to obtain. He referred to several of the local companies who were employing girls on the day and afternoon shifts, but pointed out that these companies are working steady shifts, and asked the Committee to consider the possibility of reverting to a steady shift plan in order to allow the company to employ women on at least two shifts, in several jobs throughout the plant.

Mr. Baldwin replied that if it were necessary to ask certain men to work the third shift steady, he believed this shift should carry an extra premium, besides the eight hours pay for 6¾ hours worked. Mr. Millman reminded the Committee that employees working this shift now were receiving approximately one dollar over their regular wages since they were working but 6¾ hours and were receiving an extra hour's pay. Mr. Baldwin agreed, but referred to several companies who now pay a premium for the third shift besides the extra hour's pay.

Mr. Hileman suggested that we might return to a basis of paying for actual hours worked and set a bonus of possibly ten cents on the third shift. The Committee agreed that this might be acceptable to their members.

Mr. Baldwin suggested that the original Committee negotiating the contract had gone a little

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

too far in setting the three months limit on the second shift premium, and asked if this premium could be given after one month's performance on second shift, and be made retroactive to the date the employee started on second shift. Mr. Millman replied that the Management might be willing to consider making the time limit one month, but would not care to consider any retroactive pay since such a plan would throw the costs on our job all out of line. The jobs a man may have worked on during that thirty day period have more than likely been finished and the costs completed, and it would not be possible to go back and charge the extra labor cost to these jobs after they were completed. The Committee agreed to this difficulty and stated they would like to discuss this with the membership at their next general meeting.

Mr. Millman then referred to the Forge Department which has been working on a seven day basis for three or four months, and suggested that the Committee consider revising the overtime clause to provide for time and one-half after the sixth consecutive day worked and double time for the seventh consecutive day worked in order that the Management might instigate some sort of a split shift arrangement for this department, providing a day off for each man. Mr. Baldwin replied this was a complete change in policy and it would be necessary to have the approval of the members before such change could be made. He asked if it

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

would be possible for the Forge Department to rotate on a swing shift arrangement now in order to provide a day off for the men while the membership took into consideration the possibility of changing the overtime clause. He remarked he realized many big organizations had made the announcement that they were giving up their double time for Sundays and holidays, when in reality they were reverting to the double time for the seventh day plan. Mr. Millman pointed out the men were not actually losing any money and they would receive double time any time they worked seven days in succession.

Mr. Millman noted the holiday coming up on Saturday, May 30th, and referred to the discussion held in January regarding the time and one-half and double time which some of the employees felt should have been paid. This subject was discussed in great detail with Mr. Baldwin insisting that the double time premium for holidays or Sundays was paid as a bonus for the employees foregoing their holiday and should not be computed in the payment of regular weekly overtime. It was pointed out to the Committee that they certainly would not expect the Management to pay time and one-half on Saturday to the men who have compleed the forty hours, and then pay double time on top of that time and one half. The Committee agreed that it was unreasonable to expect such a payment. Mr. Millman also referred to the man who

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

works for 10 hour days, for which he is paid 32 hours at regular and 8 hours at time and one half, and asked the Committee if they felt he should be paid time and one-half for the fifth day merely because he had worked forty hours, even though he had already been paid time and one-half for eight of those forty hours. The Committee agreed this also was unreasonable to expect, and Mr. Baldwin suggested that the Committee have a meeting and talk this over. He believed if it were understood by the membership that double time and time and one-half would not be paid for the same eight hours worked, there would be no question. Mr. Millman suggested a rider to the effect that both daily and weekly overtime would not be paid for the same hours worked.

Mr. Baldwin suggested that the Management and the Committee hold another meeting not later than May 27th, and perhaps make up a rider for the contract on this subject.

Mr. Baldwin then referred to the vacation plan and to the discussion which took place at the last meeting on the possibility of making vacation available to an employee when he has completed one year's service, and not place any deadline such as February 1st, as we now have. Mr. Millman referred to the vacations as requested for this year; pointing out that no one had requested vacations in either February or November, and suggested that the Management might be agreeable

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

to making the vacation season from March 1st to November 1st, and moving the deadline date down to July 1st, which is half way through the vacation season.

Mr. Baldwin said he did not believe he could convince any employee in the shop that a deadline on vacation service was justified and he would very definitely be against setting any date whatsoever to determine the vacation eligibility. Mr. Millman stated that were the Management to agree to vacation eligibility being determined by completion of one year's service during the vacation season the amount of paper work in the Personnel Office would be tremendous. The Management agreed to take this suggestion under consideration and promised an answer at the next meeting.

Mr. Baldwin then asked for a rate increase on the Floor Inspection job. Mr. Kearns asked if this was to mean only the Floor Inspectors or did it include the Bench Inspectors, and Mr. Baldwin replied this brought up a question which has been bothering him, since he noticed the Bench Inspectors were being placed out on the floor and wondered if this was to be a permanent or temporary set-up. Mr. Kearns said he believed Mr. Cummings intends to alternate the floor and bench inspection work, believing that in both cases it was necessary for the employees to be thoroughly familiar with the requirements of both jobs. He told

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

the Committee that rework has been increasing steadily in the past few months and that Mr. Cummings, who is now in complete charge of all inspection, believed this method of checking all parts at various stages of their operations should result in a considerable lessening of the rework.

There followed a discussion of the relative merits of the floor inspection job as compared to the bench inspection job, and it was suggested by Mr. Millman that before further discussion or any decisions were made that a conference be held between Mr. Cummings, Mr. Kearns, Mr. Millman and Mr. Baldwin to determine just exactly what Mr. Cummings' intentions were regarding the bench and floor inspectors, and then continue the discussion with this information. This was quite agreeable to the Committee.

Mr. Baldwin then informed the meeting that the question of wage freezing was causing considerable comment and discussion in the shop, and employees in general feared that within a short time their wages would be frozen at exactly what they were making at the present time. He referred to the price freezing which was effective back to March, and it was believed by a majority of the men that if wages were frozen they would no longer be able to increase their income.

Mr. Hileman replied that there apparently was no one who knew just exactly what this wage freezing was all about, and that according to all

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

information he has been able to obtain from Washington, there is no indication of any wage control within the near future. He referred to the price freezing order which affects our products, and informed the Committee that while we are not yet allowed to increase any prices, we do not yet know whether the price freezing will extend back to March 1, 1942 or October 1, 1941. He pointed out that under no circumstances could the company increase its revenue from the sale of engine parts regardless of the increases in expenses. He assured the Committee that it was his understanding that the War Labor Board, if it does go as far as to freeze any wages, will freeze only the top rates on the job, which will not effect any employee making less than the maximum rate; nor will it prevent an employee from moving to a higher paid and more skilled job. Mr. Millman pointed out that so far, the War Labor Board has granted increases only to the jobs paying less than one dollar an hour.

Mr. Hileman asked that the Committee give the Management time to see what is going to happen in the wage stabilization plan, and Mr. Millman pointed out that the President in his recent talk had intimated that no wage freezing would be done but that he expected labor leaders to voluntarily place a top on their wages in order to prevent the vicious spiraling of wages and living costs. The President had hoped by freezing prices

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

on food, clothing and rent, which are the principal expenses in a man's budget, this would automatically retard any rise in the cost of living and help to avoid an inflationary spiral.

Mr. Baldwin said he believed the employees in the shop were concerned over the possibility of being forced to pay 10% of their income in Defense Savings Bonds. He pointed out that he knew in some cases the men probably were mis-managing their money, but in the majority of cases, employees were attempting to pay off old bills which they had accumulated during hard times for the bare necessities of living, and that if the enforced savings plan was instigated, they would not have enough money to continue to remain out of debt. Mr. Hileman replied he realized this probably was the case but that every man must be prepared to make some sacrifices and that should be the individual's contribution to the war effort. He explained it was an accepted fact that our high standard of living must be greatly reduced if the war is to be won, and referred to the great volume of goods which are no longer available for purchase; mentioned the cutting down of expenses, such as automobile expense, and suggested the possibility of reducing the little luxuries such as weekly movies and other amusements.

Mr. Millman remarked that the financial experts of the country and the government were very much

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

concerned with the possibility of inflation, and explained that the national income this year is expected to be 85 billion dollars, but that the available goods for purchase will only be 64 billion dollars, leaving a difference there of 21 billion dollars which is the inflationary span. Unless the government is able to absorb this 21 billion dollars, either in greatly increased taxes or enforced savings plans, the goods which are available through competitive bidding will greatly increase in price.

Mr. Hileman remarked that he understood how the men felt about this question, but he did not think it was possible for the company to increase wages in an effort to allow everyone to maintain his current standard of living, and what did Mr. Baldwin suggest we do. Mr. Baldwin replied he didn't know what could be done and had only offered the subject for discussion. Mr. Hileman replied that the employees will have to have confidence in him and trust that he will get the best possible deal for everyone. Until we know what is going to be done about wage freezing, if anything, it is impossible for us to make any general increases. He asked that the Committee please remember that all prices on the goods we sell are frozen now, and it is impossible for us to realize any more income out of our products, except in the cases where a new article is designed and in submitting a bid on such an article we would make

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

up for the greatly increased labor and overhead costs, to a certain extent.

Mr. Baldwin asked if it were possible to save money by manufacturing in large quantities, and Mr. Hileman replied that theoretically this was true by buying larger quantities of steel and running larger quantities of the same item through the shop at one time. However, the maximum run at which a job can be done economically is not always as large as the order, and in the case of an order for 40,000 pieces it might be that 5,000 would be the maximum that could be run at one time. The necessity of running the job through in eight runs did increase the cost over the 40,000 piece estimate.

Mr. Waddell then spoke up, saying he realized he was only a guest but he would like the opportunity to express the opinion of a large number of the employees concerning the few employees who are reporting for work right at whistle time. He pointed out these people checking in a minute or so before time to go to work were unable to reach their machines and begin work for ten or fifteen minutes, and that while he did not believe this was intentional slow-down, it nevertheless amounted to a slow-down. Mr. Kearns stated that he was attempting to keep tab on these people. He had discussed the subject with some of them and had notified the foreman to talk to these men about this on the other shifts. He

(Testimony of Clarence L. Millman.)

Respondent's Exhibit No. 1-BBB—(Continued)

stated it was his intention to daily post a list of the late comers, on the bulletin board, in the hopes that they might voluntarily attempt to be at work in time to start their production at starting time.

There being no further business, the meeting was adjourned.

/S/ P. D. HILEMAN
For the Company
/S/ FRANK W. OSBORNE,
For the Alliance

RESPONDENT'S EXHIBIT No. 1-CCC

Minutes of the meeting held Tuesday, May 26, 1942, between the Executive Committee of the P. M. P. W. A. and the Management representatives. Mr. T. G. Overhulse was a guest of the P. M. P. W. A. and Mr. R. M. Rogers was a guest of the Management.

Mr. Baldwin opened the meeting by asking for an answer to his request for a new vacation plan; whereupon Mr. Millman replied the Management would be willing to set a new eligibility date of July 1st, but would hesitate to go as far as to extend it for the full vacation period because of the great amount of extra work this would entail. He reported that most contracts he had been able to find locally, based their eligibility on the date

(Testimony of Clarence L. Millman.)

of signing the contract, providing, that every man who had been employed one year at the time the contract was signed would be eligible for a vacation. Mr. Millman said that the vacation plan as requested by the Committee would cost the company an additional $1500.00 for this year alone, and that the cost, even if the eligibility date were advanced to July 1st, would cost an additional $800.00, with $700.00 more added if it were extended.

Mr. Hileman reported that the company had doubled its volume of business but had made considerably less money than last year, and had been forced to cut the dividend payments to the stockholders in half. He referred to the price freezing of our commodities, which probably will be effective as of October 1, 1941, and pointed out that our labor rates have risen as well as our taxes, so that the company actually is getting considerably less income from its business. He asked if the Committee believed the granting of their vacation plan would stop the arguing which has gone on about it since November, or would they come back within a short time with an even bigger vacation plan. He suggested cutting the vacation period from March 1st to September 30th or October 31st, since there were no requests for vacations during the month of February and November.

The subject was dropped for the moment, and Mr. Baldwin reported the Committee wished to ask for a 10% blanket increase, the increase to

(Testimony of Clarence L. Millman.)

be taken in Defense Bonds by all employees. In return the Committee would voluntarily freeze the wages at their current level for the duration. Mr. Millman asked what assurance the Management would have that the freezing would be effective when a new contract was up for negotiation, and Mr. Baldwin replied the Committee was willing to make a provision in the contract to provide for carrying forward as long as the price freezing is effective.

Mr. Hileman doubted that any freezing of wages would be legal or could be included in the contract, and remarked this would mean a considerable increase of paper work in the Accounting Department by making deductions for everyone.

At this point, Mr. Stewart, Auditor for this plant, was called into the meeting. He reported that a separate account for bonds must be set up for each employee, besides the account for all the other deductions. Mr. Millman suggested that if such a plan were put into effect all other deductions could be cut out, but Mr. Stewart replied there were still some, such as the Social Security deductions, the State Unemployment Insurance deductions, the employees group insurance, Old Guard loans, and tools and uniforms purchased through the company. The Committee agreed that deductions for tools and uniforms could be stopped and employees could pay cash for these things when they were purchased, either through the company or from the uniform salesman. Mr. Stewart agreed

(Testimony of Clarence L. Millman.)

this would help some but a plan for all employees would still increase the work in the Accounting Department greatly. Mr. Hileman asked for a little time to consider this proposition from all angles and to find out how much such an increase would cost the company.

Mr. Baldwin reported that the suggestion of the straight shifts was discussed at the recent meeting of the members of the P. M. P. W. A. but no decision was arrived at since most of the members did not understand how this could be worked out. Mr. Baldwin suggested that a plan be worked out on paper, listing the various provisions of the steady shift, and posted on the bulletin board for consideration by all employees. He stated the Committee would like to be as honest and fair as possible and suggested that the Management make a survey to ascertain the employees stand on this question of steady shifts. Mr. Millman asked if the company was able to go along on the ten percent deal, would the vacation plan with a deadline of July 1st be satisfactory, but Mr. Baldwin did not care to answer. He did say that the Committee might consider the clause paying double time for the seventh day of work. Mr. Miller asked if this would be giving up weekly overtime, but Mr. Hileman replied the work week consists, under this plan, of the days *work* between the days off, and the contract would be amended to read "time and one-half payable on the sixth consecutive day

(Testimony of Clarence L. Millman.)

worked and double time on the seventh consecutive day worked.

Mr. Millman asked the Committee if they had made a decision regarding the rider to clarify the overtime payments in regard to paying overtime on weekly and daily basis for the same hours worked. Mr. Baldwin replied this was not discussed at the meeting and he could not give an answer yet. He referred to the last meeting in which the inspector rate was discussed. Mr. Millman said the management would not care to consider that item until an answer was made on the ten percent increase and if the ten percent increase was put into effect, it would supercede any requests for individual rate increases.

Mr. Baldwin said the majority of the men at their last meeting had unanimously asked to have their dues deducted from their pay checks every four months, to be done on a voluntary basis. He did not consider this a check-off system or union maintenance, since it was entirely voluntary. Mr. Hileman replied he would like to think that question over before giving any answer.

Mr. Baldwin asked for an answer on the vacation plan, but Mr. Millman replied that the new request altered the situation, and that an answer could not be given at this time. However, an answer was promised to the committee before the end of the week.

(Testimony of Clarence L. Millman.)

There being no further business, the meeting was adjourned.

/S/ P. D. HILEMAN
For The Company

/S/ H. BALDWIN
For the Alliance

RESPONDENT'S EXHIBIT No. 1-DDD

Minutes of the meeting held May 29, 1942 between members of the Pacific Motor Parts Workers Alliance Committee and the Management group.

Mr. Millman opened the meeting with the statement that the management regretted to inform the committee that their request for a ten percent blanket increase was financially impossible. He reminded the committee that a seven cent blanket increase had been given on March 16th, which was less than three months, and additional increases so soon should not be expected. He referred to the cost of living which, according to figures received from the Bureau of Labor Statistics, has risen but 17% over the 1935-1939 average; while our wages in this plant have increased 55% over the September 1, 1939, average.

Constant comparisons are made with other aircraft parts companies to insure that our wages remain on an equal level and the management suggests that one member of the committee accompany

(Testimony of Clarence L. Millman.)

him on a new survey of comparable industries to compare their wages with ours.

He referred to the price freezing which has tentatively frozen the selling price of the company's products on October 1, 1941, and referred to the blanket increase on November 15, 1941, plus the addition of the 6c to replace the 6% bonus plan, and also the 7c blanket increase on March 16, 1942 —all of these increasing our labor costs while we are unable to increase our selling prices. He stated the President of the U. S. A. and various high public officials have gone on records as being against any general wage increases except on rates now considered as sub-standard. Sub-standard rates are defined as less than 40c an hour or less than $25.00 a week for a married man. He pointed out the company had tried to maintain maximum hours for the employees and that our overtime costs increase our hourly rate from 97c to $1.09. The Company is unable to pay a general ten percent increase without making a drastic cut in overtime premiums by reducing the work week to 40 hours.

Mr. Hileman told the Committee, however, that the management was willing to go along with their request for a more liberal vacation plan, and suggested that the vacation season be from March 1st to October 31st, and employees completing one year's service within that period would be eligible for one week's vacation.

The Committee suggested they might find it advisable to take their case to the War Labor Board

(Testimony of Clarence L. Millman.)

for settlement, to which the management replied that was the perogative of the committee.

Reference was made to the present overtime provisions concerning the Maintenance Department in the contract, which states that if they work on their day off they will receive double time for this day. Mr. Millman brought out the possibility of a man whose regular day off was scheduled for a Wednesday and who was sick on Monday and Tuesday—according to the literal translation of the contract if he came to work on Wednesday, which should have been his day off, he would be entitled to receive double time for that day, even if it were the only day worked during the week. He suggested that this clause be reworded, thus: "In the event they work on their regular day off they shall receive double time for the seventh day worked."

Mr. Baldwin asked if there was any case in question at the present time, to which Mr. Millman replied there was not, but this was suggested only to clarify the situation in case the matter comes up at a future date. Mr. Baldwin stated if there was no one to be affected at the present time, he believed the committee would not have any objection to placing this rider to the contract.

Mr. Millman referred to the glove situation again, stating that the glove cost for April was $90.00, and that the gloves which formerly cost 31c were unavailable and it would be necessary to pay 55c for the new gloves received. However, these were

(Testimony of Clarence L. Millman.)

of better quality than the 31c gloves formerly received. He suggested that it was only logical to ask the employees to pay this additional cost since the company could not afford to continue furnishing gloves at this higher price.

Mr. Hileman told the committee that the management could not agree to any deduction of dues for the union. It is the union's business to collect their own dues and the company could not do this for them.

There being no further business, the meeting was adjourned.

/S/ P. D. HILEMAN
For the Company
/S/ H. BALDWIN
For the Alliance

RESPONDENT'S EXHIBIT No. 1-EEE

Minutes of the Labor Relations Council held Friday, June 19, 1942. Mr. Eddie Collatz was a guest of the Executive Committee, and Mr. Homer Alldredge, Sales Manager of the Detroit Plant, was a guest of the Management.

Mr. Hileman introduced Mr. Alldredge and asked that he tell the Committee something about the Detroit plant and the work now being done here. Mr. Alldredge obliged with a brief discussion of the Detroit Plant.

(Testimony of Clarence L. Millman.)

Mr. Millman reminded the Committee that while the late comers had decreased in number very materially over the past few weeks, there were still a few stragglers who came in from one to twenty minutes late. The progress which has been made in reducing this tardiness is gratifying, but the further we can reduce it the better off we are. The same held true for absenteeism, and it was thought several employees were taking advantage of the sick excuse. Therefore, in the future it would be necessary for an employee who stays home because of sickness, unless it is a chronic illness with which the Management is familiar, the employee will be required to furnish a doctor's statement concerning his illness. It is the desire of the Management to find out why certain employees are ill so often, but in order to do this the complete facts of an employee's illness must be available.

Mr. Millman then touched on the subject of racial discrimination, saying that there was much discussion now, both by the Government and the War Production Board, about this subject. He told the Committee the Management had no objection to hiring a person of any race, religion or color, providing this person had the necessary qualifications desired on the job.

Mr. Millman again referred to the possibility of setting steady shifts on at least the polishing machines, suggesting that if steady shifts were placed, it would be possible to hire about twenty-eight wom-

(Testimony of Clarence L. Millman.)

en for the day and afternoon shifts—the day shifts to begin at 6:00 a. m. and end at 2:30, the afternoon shifts to begin at 2:30 p. m. and end at 11:00. Mr. Baldwin replied the membership would not be very enthusiastic about such a plan and might insist on a premium for the third shift. Mr. Hileman asked if the Committee would consider pay for hours worked, plus a premium on the third shift, but Mr. Miller replied they would prefer the present set-up since pay for hours worked plus a 5c bonus would be less than the present bonus plan.

Mr. Baldwin suggested if a premium was placed on the third shift it might be the solution to the steady shift problem since the afternoon shift has pretty well settled down to a steady shift since the premium was placed. Mr. Millman promised that an answer would be given to the Committee on this subject within a short time.

He reported he had heard several adverse comments on the Committee's plan to donate rubber to the U. S. O. and suggested the Committee might consider giving it to the Navy Relief Society, which the Committee agreed was a good suggestion.

Mr. Millman told the Committee he was still waiting for them to appoint a man to make a survey among aircraft parts manufacturers on wages paid. The Committee agreed this would be done at once.

Mr. Osborne asked if Mr. Bebb was considered a lead man, to which Mr. Kearns replied that he was not since the welders are all responsible to the

(Testimony of Clarence L. Millman.)

foremen. The Committee suggested that since the foremen seem to hold Mr. Bebb responsible and that he took care of ordering supplies and laying out the work, it seemed reasonable he should be considered a lead man. Mr. Millman asked time to consider this point and promised an answer soon.

The Committee asked if the Management would consider any blanket increase at all, and Mr. Millman replied that it would not, but did agree to adjusting individual rates which were found to be below average.

It was asked by the Committee if the Management expected to place a bonus on the aircraft work. Mr. Anderson replied he was working on time studies with that end in view, but it would be some time before his studies were complete enough to form any definite opinion on what standards should be on certain jobs. The Committee asked if this would be a group bonus or an individual bonus, and Mr. Anderson replied there was no decision made on that point, yet, but that the Management might consider a bonus by operations or by a complete job.

There being no further business, the meeting was adjourned.

/S/ P. D. HILEMAN
For the Company

/S/ H. C. BALDWIN
For the Alliance

(Testimony of Clarence L. Millman.)

RESPONDENT'S EXHIBIT No. 1-FFF

Minutes of the Labor Relations Council held Thursday, July 2, 1942. Mr. Art Starkey was a guest of the Committee of the P. M. P. W. A. and Mr. E. Collatz represented Mr. F. W. Osborne.

Mr. Millman opened the meeting referring to minutes of a previous meeting where a discussion was held on the possibility of placing a 5c premium on third shift. He informed the Committee the Management had decided to agree to this policy, making this premium effective at the beginning of the next pay period of July 5th, at which time this premium would be given to all employees who had been working the third shift steady 30 days or more.

Mr. Baldwin thanked the Management on behalf of the Committee, and brought up the subject of the joint - Management-Union survey of wages in comparable industries. He did not believe that increases in individual rates would solve the problem confronting the Committee, but thought a general increase should be made. He referred to the price ceiling and remarked he believed 50% of the merchants were not adhering to this ceiling; noted the probable greatly increased income taxes for 1942, as well as increases in vegetable, poultry and dairy products which have no ceiling prices.

The Management called attention to the fact that the increased cost of living had not yet increased more than the blanket wage increase granted in March, and informed the Committee the reason for

(Testimony of Clarence L. Millman.)

increased taxes was to absorb the inflationary buying power, and it was expected by Government officials that the standard of living of everyone would be drastically lowered. It was suggested that the Committee might have the wrong idea about the 10% withholding tax, believing this tax would be payable on gross income. This is not true, and any 10% tax which the Government may impose would be figured individually on an employee's taxable income.

Mr. Baldwin suggested we let this subject drop for the moment, and asked what the Management's decision was on the lead man rates for certain individuals. Management's reply was that they did not believe these rates were justified on these jobs since the men are now receiving more pay than any of their men in the department and are not formally charged with the operation of their department. It was stated that Mr. Starkey had increased production in the Plating Department and had cut down scrap, at the same time using less man hours, but Management replied that this was Mr. Starkey's job and he was being paid a Plater's rate for doing this job. He is the only man receiving the Plater's rate in the shop, and our rate is now higher than the average rate for other shops. A survey showed the aircraft rate at $1.05, and one plating company at $1.08. Starkey stated that according to the rate being given to grinders, he believed the Plating rate should carry the same, to which Management

(Testimony of Clarence L. Millman.)

replied the Plating was done by time element, whereas grinding was done to a tenth of a thousandth and it was considered a much higher skilled job. The Management asked a little time to consider this item.

Mr. Baldwin then stated the die makers felt they should have the same rate as the Class B Tool Makers, since they hold the same tolerance, but Mr. Kearns replied that the die making work was a repetitive job and could be done by a trainee, whereas the tool maker job was a varied and more difficult job, even though it often times did not hold the same tolerances. It could not be done without a considerable background of experience in general machine shop work. However, Mr. Baldwin asked that the Management consider an increase in this rate, and that he would present further facts at the next meeting.

Mr. Baldwin again referred to a general increase and Mr. Millman said if the company was financially able to make an increase it would gladly do so since it was our policy to give our employees the best deal possible, but such an increase at this time could not be given without weakening the financial structure of the company.

Mr. Hileman asked what the reaction would be to a percentage increase which would be withheld and paid at some later date in a lump sum. The Committee stated this probably would be acceptable.

(Testimony of Clarence L. Millman.)

Mr. Hileman reminded the Committee that all of this new machinery which we have been receiving is not all company owned, since the company must pay back approximately 22% of the cost of this machinery to the Defense Plant Corporation each year, and it was his responsibility to see that the company earned enough money to make these payments. He promised to consider the Committee's application and give an answer at the next meeting.

There being no further business, the meeting was adjourned.

/S/ P. D. HILEMAN
For the Company

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For the Alliance

RESPONDENT'S EXHIBIT No. 1-GGG

Minutes of the Labor Relations Council held Friday, August 14, 1942. Guests of the Committee were Harold King, W. L. Reddington and A. J. Smith. Guest of the Management was Carl Cummings. Mr. Millman introduced Mr. C. E. Gillie, who will be a Management representative.

Mr. Baldwin opened the meeting asking if an answer was available regarding the request for a blanket increase, or the possibility of receiving an increase to be paid in a lump sum at a later date. Mr. Millman replied that the Management did not

(Testimony of Clarence L. Millman.)

feel a general wage increase could be granted, especially in the face of the evident disapprival of the War Production Board, the Office of Price Administration and even the War Labor Board, except in cases where wages were sub-standard or no increase has been granted since January 1, 1941. Mr. Baldwin referred to recent increases which had been granted to the Standard Oil Company of California and General Electric Company, but Mr. Millman replied that these wage increases had been granted, but no increases had been made since the signing of their contract, while our employees had received one blanket increase and numerous individual rate adjustments. He referred to the recent increases granted the Little Steel Industries, in which the War Labor Board granted the 44c a day increase due to the fact that the cost of living between January 1, 1941, and July 1, 1942, had risen some 15% and wages in these companies had risen only 11%.

The Committee then asked for an answer to the request for a lead man rate in the welding and plating departments. Mr. Millman agreed these rates were justified, since the Management had very thoroughly checked into the situation and believed the record shown by these men justified their classification as Lead Men for these departments. He included the Tool Crib in this category, and promised the Lead Man's rate for the man in charge of the Tool Crib. He further stated that these men had never before been formally charged with the respon-

(Testimony of Clarence L. Millman.)

sibility of these departments, but from now on they would be completely responsible and would answer to their department heads only.

The Committee asked if a rate had been established on the Boromatic machine. Mr. Millman found that this rate had been established in January, 1942, but a rider had not been made for the contract. This would be taken care of at once.

The Milling machine was referred to, and it was suggested that a rate be set on this machine. Mr. Kearns stated these machines had been included under the Small Machine Operators, but suggested that a list be made up of all machines included in the small Machines rate and the Production Hand Screw Machine rate.

Mr. Miller asked that the tubing upsetter be included under the large upsetter, and the Management replied that this was understood to be the case. The Committee felt the screw press used on tubing should have the same rate as the large hammer, and Mr. King spoke up reporting this was one of the dirtiest jobs in the plant, there was no limit to the responsibility of the hammer operator, because if the operator did not give the proper instructions as to the results of the upsetting, to the upsetter operator, the scrap content would be very high. Mr. Kearns asked for a few days to check into this, but believed the argument had some good points.

Mr. Baldwin asked then for a statement from the

(Testimony of Clarence L. Millman.)

Management regarding equal pay for women. The Management replied this had been the intention, and knew of no case where women who were doing equal work with men were receiving less pay than the men. There were some jobs which would not carry an equal rate, however, due to the great amount of lifting which the women operators cannot do. It was suggested a survey be made by Mr. Kearns, Mr. Long and Mr. Miller of the various jobs which could be done by women and the amount of manual lifting required on each job. In the cases where much lifting is required, it will be necessary to furnish a man to do nothing but lifting for the girls. Mr. Hileman agreed where a girl does an equal job with a man she should have equal pay, but where another man's time is required to do part of the woman's job, a lower rate should be established.

The Committee referred to the Magnaflux operators in the Inspection Department who were now receiving the female inspectors rate, whereas this job had formerly been done by a man. Mr. Cummings replied the reason it had been done by a man was that he did not care to ask the girls to run these machines because of the dirtiness of the job and the constant lifting of pans.

There followed considerable discussion on this point, and the Management asked for 30 days to study this job, with one man in the Inspection Department representing the Union and Mr. Cummings representing Management.

(Testimony of Clarence L. Millman.)

Mr. Baldwin asked that the rate for female inspectors be increased, since many of those girls are now working alongside the men. While he realized they were not doing the same work, he did feel the rate should be a little higher. Mr. Millman agreed on this possibility, but asked a little time to check other plants on their female inspection rate.

Mr. Baldwin then asked for a higher rate on the Blanchard grinder, but the Management did not feel this justified since the operator was doing the same work he had been doing on the old grinder and the work was easier. The Committee referred to the increased responsibility since more operations are done at one time than on the old machine and an improper set-up would cause more scrap. Management replied the set-ups were much simpler and the operations greatly simplified and should help the operator cut down his scrap rather than give him the opportunity to make more scrap. However, it was agreed that a survey on this job would be made.

There being no further business, the meeting was adjourned.

/S/ P. D. HILEMAN
For the Company

/S/ H. C. BALDWIN
For the Alliance

GEORGE McINTIRE

resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Watkins:

Q. Mr. McIntire, you are familiar, are you not, with a meeting which was held sometime in July of 1937 between some 15 or more employees, of the company, and the management, concerning a formation of an independent union?

A. I wasn't at the meeting at all.

Q. You are familiar with that particular meeting, are you, having heard testimony about it, or having heard the situation? A. Yes, sir.

Q. Will you state whether or not you were present at that meeting? A. No.

Q. When did you join the Alliance with respect to that meeting?

A. I couldn't be exact, but I would say near a year afterwards.

Q. At the time of this meeting were you a member of any outside labor organization?

A. C. I. O.

Q. Mr. McIntire, did you have a conversation with Mr. Victor Kangas sometime near the date of this meeting I have just been [682] referring to, about unions? A. Yes, sir.

Q. Will you state approximately when it was with respect to this meeting.

A. About a week.

Q. A week before or after?

(Testimony of George McIntire.)

A. I would say a week before this meeting.

Q. In other words, it was within a week before. Is that correct? A. Yes, sir.

Q. Where did that conversation take place?

A. In the shop adjoining the two rooms, a small room we had there for maintenance work.

Q. Was anyone present in its besides yourself and Mr. Kangas? A. No.

Q. Will you state what was said there?

A. I had called him over there and I had heard a rumor about the independent union, and I asked him what it was they wanted, the C. I. O., or if an independent union was going in. And he says they wanted the C. I. O., and he says, "We have got to get a move on, or this independent is going to beat us."

Q. Did you say anything to him about it?

A. And I told him that I wanted to know, that they had asked me to join the C. I. O., and if his interest was discontinued, why, I was going to drop out. [683]

Q. Was that all of the conversation at that time?

A. That's all that I recall. We might have talked of other minor things; I wouldn't say about that.

Q. That was all about that subject?

A. Yes.

Mr. Watkins: That is all.

(Testimony of George McIntire.)

Cross Examination

By Mr. Moore:

Q. When did you drop out of the C. I. O.?

A. I never paid any dues, from the time I talked to Mr. Kangas I never paid any dues up any more.

Q. Is that about the time you discontinued your C. I. O. membership, or affiliation? A. Yes.

Q. About the time you talked to him, just before this meeting of the employees with the management? A. Yes, sir.

Q. What was the substance of that conversation again?

A. I asked him if he still wanted the C. I. O. or if he was for this independent union, and he says, "Well, hell no; the C. I. O." That's the very words he used.

Q. He said he wanted the C. I. O.?

A. C. I. O., yes, sir

Q You had originally joined the C. I. O. because he asked you to, hadn't you?

A. That's right. [684]

JAMES D. CREEK

a witness called by and in behalf of the respondent, having been first duly sworn, was examined and testified as follows: [688]

Direct Examination

By Mr. Watkins:

Q. When was it you were first employed by Thompson Products or Jadson Motor Products, its predecessor? A. About February, 1923.

Q. And you are still with the company, are you not? A. That's right.

Q. What is your present position?

A. Factory representative.

Q. Will you state, Mr. Creek, when you recall the first union activity down at this plant, that is, the Jadson plant?

Trial Examiner Whittemore: May I interrupt, if you don't mind, the words "factory representative" have a certain connotation in commercial enterprise. They also have in the union. Now, I want to know whether he is a factory representative or whether he is an employee of management, as a representative. A factory representative in the usual sense or term is a salesman.

The Witness: That is true in my case. I work in the sales department. I represent the factory in sales.

Trial Examiner Whittemore: You are not a production employee?

The Witness: That is right. [689]

Q. (By Mr. Watkins) Will you state when,

(Testimony of James D. Creek.)

around 1935, the first union activity occurred at this plant, that you know of.

A. As I recall, it was during the N. R. A., about the time the Fair Labor Standards were set up under that.

Q. Will you state what happened around that time, just as briefly as you can, where the union was involved?

A. At that time the employees had become pretty well dissatisfied with working conditions and when they found they were to be offered a chance for collective bargaining, they decided to look into it, and to try to affiliate with an outside union.

Q. What union was that?

A. They finally decided to go into the A. F. of L.

Q. The Machinists Local of the A. F. of L.?

A. That is right, the Machinists Local.

Q. Was any election held under the N. R. A. down there? A. Yes, there was.

Q. Who was on that ballot?

A. The A. F. of L. and what we termed "The Employees Association."

Q. Was there any discussion among the employees at that time as to whether or not the company had an interest in this Employees Association? [690]

A. Yes. I recall that was discussed and most of we older men came to the conclusion that it was company-dominated.

Q. At this election do you recall which union was elected as the bargaining agent?

(Testimony of James D. Creek.)

A. A. F. of L.

Q. Do you remember what the vote was on it?

A. As I recall, it was about two to one in favor of A. F. of L.

Q. Then after that time—strike that, please.

After the A. F. of L. was elected, did you go on any A. F. of L. committee?

A. No. I wasn't on an A. F. of L. committee. I was on a committee previous to the election to contact the employees.

Q. Did that have anything to do with the A. F. of L.?

A. No. After the election was held I held no office with the A. F. of L.

Q. Do you still retain your membership with the A. F. of L., or did you, after that time?

A. No, I do not.

Q. You do not now? A. I do not now.

Q. How long were you a member of the A. F. of L.?

A. I was never really in it. I applied for membership and paid part of the initiation fee, but I don't recall ever having paid any dues. [691]

Q. Were there quite a few of the other men who did similarly, do you know?

A. I beg your pardon?

Q. Where there quite a few of the other men who did the same thing?

A. That is right, a number of them.

Q. Do you know why they dropped out, and why you dropped out of the A. F. of L.?

(Testimony of James D. Creek.)

A. Well, we attended some A. F. of L. meetings and thought perhaps they would help us in getting better wages and better working conditions. But practically no effort was made by them to do this, so we just considered the initiation fee and dues were not worth what we were getting, so it just died.

Q. Now, going to the period in 1937, oh, around July of 1937, did you attend any meeting of a group of 12 or 15 or 20 employees which called upon the management in regard to formation of a union?

A. No, I didn't attend that meeting.

Q. You were not present?

A. No, I was not.

Q. When was the first time that you heard about this call by the employees on the management, about an independent union?

A. I heard about it that afternoon after working hours, the same day that this meeting was held.

Q. Yes; and from whom did you hear it? Let's hear what you [692] did hear about it at that time.

A. Well, some of the fellows approached me and asked if I would come to a meeting that they were holding this evening to try to get this thing started. [693]

Q. Can you state who approached you concerning it?

A. Well, I think I remember one or two. I recall Wayne Kangas was one, and I believe Ed Fickle was another.

Q. Was Lou Porter another one of them?

(Testimony of James D. Creek.)

A. No, Mr. Porter never did approach me on the subject.

Q. Do you recall any application cards that were passed out at any time during this period, that is, application cards for membership in the independent union?

A. The first I recall seeing any such cards was at the first meeting which was held.

Q. Where was that first meeting held?

A. That was at an electric shop in Maywood.

Q. An electric shop in Maywood?

A. That's right.

Q. Do you know anything about a collection that was made among the men for the purpose of buying cards or supplies, or anything of that kind?

A. Yes, I recall a collection was made amongst some of the fellows and the money was turned over to me to buy paper, or stuff we would need to kind of carry us on, to start the dues coming in.

Q. Now, then, going back again to the cards, I believe you testified the first time you saw the cards was at the first meeting. Was that first meeting in the electrical shop? A. That's right. [694]

Q. Was that an electrical shop in Maywood?

A. That's right.

Q. How many employees were present?

A. I would say between 40 and 50.

Q. Who had the cards at that meeting?

A. I don't know exactly, I don't exactly recall. I just know I came in possession of them after I

(Testimony of James D. Creek.)

was appointed chairman of the constitutional committee. They were turned over to me.

Q. Do you remember who turned them over to you?

A. I believe a fellow by the name of Dean Gardner.

Q. What did you do with the cards after you obtained them at that meeting?

A. Well, part of the cards that were turned over to me already had some signatures on them; part of them were just blank. As I recall, we gave out some of the cards to various of these men to pass out down at the gate, at the plant.

Q. Did you yourself pass out any of the cards?

A. I never did pass out any of the cards.

Q. What was done besides this at the first meeting in the electrical shop, that you mentioned?

A. Well, they decided to elect a committee to draw up constitution and by-laws, the first step.

Q. Was that substantially all that took place at this meeting in addition to what you have already related? [695]

A. As I recall, Les Bebb was in some way made chairman pro tem of this meeting, and I think the first thing he did was to get up and read sections of the Wagner Act, regarding labor standards, what we could do and what we couldn't do, and so forth.

Q. Was that at the first meeting or the second meeting? A. That was the first meeting.

Q. Who was appointed on this committee, this so-called constitutional committee?

(Testimony of James D. Creek.)

A. Well, there was Lester Bebb, George Fickle and Floyd Pfankuch and myself, Luther Leatherwood.

Q. Then, what was the next step that that committee took with respect to organizing the independent?

A. Well, we met in the home of one of the committee men, I believe, on the following evening, to more or less, oh, get our ideas together on what we would want in the way of a constitution and by-laws.

Q. You had some discussion there on that, did you?

A. That's right. Each one made suggestions of what they thought we ought to have.

Q. Did you discuss, then, about going to some lawyer concerning it?

A. Yes. We decided that would be the thing to do, to get an attorney that we felt we could trust, to draw up this document for us. [696]

Q. Who selected the attorney?

A. Well, I think the final say in the selection, was Mr. Schooling, who was at that time, I believe, city attorney of Huntington Park.

Q. I see. Then, what did you do with respect to interviewing Mr. Schooling?

A. Well, I believe the following day after our meeting that we went to see Mr. Schooling. I think there was Mr. Bebb and Mr. Leatherwood and myself made the first visit.

Q. Did you take anything with you when you

(Testimony of James D. Creek.)

went to see Mr. Schooling, any form of constitution, or anything of that kind?

A. We had no form drawn up. I believe I had a few notes jotted down as to what the discussion was the previous evening.

Q. Those were only notes which you had?

A. That's right. We just told him verbally about all we would want.

Q. What did you ask him to do?

A. Well, he told us he would frame the constitution along those lines and he would submit it to us the next day for our approval.

Q. Did he tell you about the Wagner Act and those provisions?

A. Yes, I believe that's one of the first things he did when we went in, is to read the Wagner Act to sort of guide us as to what we could do.

Q. Subsequent to that did you obtain the constitution from [697] Mr. Schooling?

A. That's right.

Q. You picked it up or how did you go about getting it?

A. The full committee went over, I suppose that must have been the following day, to take a look at this constitution, and we read it over and made a few minor changes. I remember one specific change was in the name.

Q. What did you do with this constitution after that? Did you take it to the second meeting? Is that correct?

A. That's right; we had a second meeting.

(Testimony of James D. Creek.)

Q. Then, state briefly what happened at the second meeting with respect to this constitution?

A. Well, Mr. Bebb, read the constitution and we then asked for a vote on it as to whether that would be acceptable to the members.

Q. Did you take a vote on it at that meeting?

A. That is right.

Q. Yes. Did Mr. Schooling draw any by-laws for you?

A. I don't believe there were any by-laws on the original constitution. There might have been one or two, but most of the by-laws were attached, they were drawn up by the committee and attached after the original constitution was drawn.

Q. Do you know who actually paid the fee of Mr. Schooling?

A. Well, it was paid by the committee through myself and Dean Gardner. [698]

Q. You yourself have personal knowledge of that?

A. That is right; I signed the check.

Q. At this first meeting that you had with the attorney, was there any discussion of names for your independent union?

A. Yes, I think we discussed that somewhat.

Q. Had you discussed it, your committeemen, prior to going to the attorney?

A. Yes, we discussed that too.

Q. Will you state what the discussion was, as nearly as you can recall, with respect to a name for the union, the Alliance?

(Testimony of James D. Creek.)

A. Well, several names were offered, as I recall, and finally we decided to adopt the Pacific Parts Workers Alliance.

Mr. Moore: Pardon me; may I have the last question and answer?

(The record was read.)

Mr. Moore: I will move the answer be stricken on the ground it is not responsive to the question.

Mr. Watkins: I might say, not to argue, Mr. Examiner, but it may be a little more than was asked in the question, but I can obtain the same answer by asking another question.

Trial Examiner Whittemore: I think that is true. It goes a bit beyond, but I will permit it to remain, and deny the motion to strike.

Q. (By Mr. Watkins): Did you at these discussions finally decide on the name to be used? [699]

A. We did.

Q. What name did you decide on?

A. Well, the first name was Pacific Parts Workers Alliance.

Q. Did you decide at a later time on a different name?

A. Yes, at the time of our first meeting, with the attorney, after giving it some thought, I decided that that was not specific enough.

Q. Then, did you and the committee decide to make a change in the name while you were discussing it with the attorney? A. Yes.

Q. What name did you decide on at that time?

(Testimony of James D. Creek.)

A. Pacific Coast Motor Parts Workers Alliance.

Q. I show you Board's Exhibit 3, which purports to be the constitution, and I will ask you if that is the constitution which was presented at the second meeting and approved by the members as you have related?

A. Is this the original that was submitted by the Alliance?

Q. Yes.

A. Well, I will say that was, then.

Q. Now, I direct your attention to the name at the top of it: Pacific Motor Parts Workers Alliance, with some word stricken out. Do you know anything about the word stricken out and why it was stricken out?

A. Yes, that was "Coast."

Q. Was there any discussion of that? [700]

A. Yes. We had discussed Pacific Coast Motor Parts Workers Alliance, and in the final analysis decided that was too long, and asked the attorney to delete "Coast", just leaving Pacific Motor Parts Workers Alliance. But evidently, through a typographical error, his secretary included it in the original draft. So, we just scratched it out and wrote it P. M. P. W. A.

Q. Mr. Creek, referring again to these application cards, did Mr. Louis Porter ever give you any application cards?

A. No, he did not.

Q. Did Mr. Hodges, Mr. Lyman Hodges, ever give you any of those application cards?

(Testimony of James D. Creek.)

A. He did not.

Q. Around this period of time, that is, the period of the formation of the Alliance, was there any discussion among any of the men, in which you participated, about the advisability of forming an independent union as against an outside union?

A. Well, at what time?

Q. Around the time of the formation of the Alliance, either immediately before or immediately afterwards?

A. Well, I know there was quite a lot of discussion around the time.

Q. Did you yourself have some discussion with some of the men about the advisability or inadvisability of forming an [701] independent union?

A. Yes, I did.

Q. Will you state about when this took place—strike that, please.

Were you at the time for or against the independent union?

A. Well, I would say that I was neutral.

Q. All right. Will you state when you had discussions about the advisability or inadvisability of forming an independent union?

A. Well, I would say it was immediately after the first meeting I attended.

Q. Do you remember with whom you had your discussions?

A. Well, I know with Wayne King, and with Ed Fickle I did.

(Testimony of James D. Creek.)

Q. In these discussions was an experience with the A. F. of L. related in any way?

A. Yes, it was.

Q. Was any experience which you had had with the C. I. O. related in any way?

A. It was.

Q. Will you state what you said with regard to both matters?

Trial Examiner Whittemore: What is the materiality of this, Mr. Watkins?

Mr. Watkins: I think it is material with respect to the following question, Mr. Examiner. [702]

Trial Examiner Whittemore: Suppose you put the following question and never mind this one. I don't know what materiality this has. This was after the organization was under way.

Mr. Watkins: All right. I will put the following question, then.

Q. (By Mr. Watkins): Did you or did any of the other men at any time express yourselves as desiring to go ahead with the independent, and then if it didn't work out, turn it over to the C.I.O.?

A. Yes. I remember one man making that statement to me.

Q. Do you remember when that occurred?

A. This is the time I referred to, one of these conversations.

Q. Do you remember who it was?

A. It was Ed Fickle.

Q. Mr. Ed Fickle?

(Testimony of James D. Creek.)

A. That's right. [703]

Q. How long have you been acquainted with Mr. Wendell Schooling?

A. I had never met him before this first visit.

Q. Why did you go to him?

A. I believe one of the committee members suggested him.

Q. Who was it?

A. I don't know if I could say definitely. I think it was Les Bebb, but I wouldn't be sure.

Q. You and Bebb and Leatherwood went up there? A. That's right. [706]

Q. When did you leave the plant down here in Bell, California?

A. How do you mean, by left it?

Q. Well, where were you transferred? You are not there now, are you? A. No.

Q. When were you transferred?

A. In February, 1939.

Q. February, 1939? A. That's right.

Q. How long did you remain president of the Alliance? A. Just for one term.

Q. That would be until what date, or approximately what date? A. Until August of 1938.

Q. After that did you hold any office in the Alliance?

A. No, I relinquished my office and also gave up my membership.

Q. At the time you ended your term in office?

A. Beg pardon?

(Testimony of James D. Creek.)

Q. At the time you ended your term in office?

A. That was immediately after the election in August, 1938.

Q. You resigned from the Alliance?

A. That's right.

Q. Were you promoted at that time?

A. Yes. That was when I was put in the sales department. [707]

Q. How long after this election of a new president was it until you were promoted?

A. I would say possibly 30 days.

Q. During the time that you were president of the Alliance did you know you were going to be promoted after your term ended?

A. Well, I didn't know until just about the time of the election.

Q. Had you applied for a position opening in the sales department? A. I had.

Q. And you applied while you were still president?

A. No. I applied before the union was ever started.

Q. Oh, you applied long before?

A. Not long before. I believe it was about April, about the time Thompson Products took over.

Q. Your testimony was that you never received cards from anyone at the plant then?

A. That's right.

Q. These membership cards you never received?

A. That's right.

Mr. Moore: That is all.

(Testimony of James D. Creek.)

Trial Examiner Whittemore: Anything further, Mr. Watkins?

Mr. Watkins: No, sir.

Q. (By Trial Examiner Whittemore): What was your job before [708] you were made a salesman?

A. I was experimental—I was in charge of maintenance at the factory.

Q. From what period on?

A. Oh, I would say that was about, oh, possibly six months before I put in the sales department. Before that, I was experimental tool maker.

Q. And how long were you an experimental tool maker?

A. Well, from the time, approximately the time I came back to Thompson Products in 1937 until that time.

Q. You came back to Thompson Products when in 1937?

A. Just about the time they took over; I believe it was about April of 1937.

Q. That is, you were an experimental tool maker at this time this association was formed?

A. That's right.

Q. As experimental tool maker what were you? In charge of other tool makers?

A. No. Down there I was directly under the chief engineer in development of new processes or ways of making special dies of special jigs or fixtures; new production methods.

(Testimony of James D. Creek.)

Q. Were you working with the men or just working with the chief engineer?

A. Well, I wasn't working with any men. I mean, I was more or less to myself. [709]

Q. You were not in production?

A. No, I was not in production.

Trial Examiner Whittemore: All right.

Q. (By Mr. Moore): One other question: You say you were in charge of maintenance until you were made a salesman?

A. Yes, that's what I would say; I had two men working for me.

Q. Who has that job now?

A. I believe a Mr. Beach.

Q. Glen Beach? A. Glen Beach.

Q. Do you know when he took it over?

A. No, it was after I left or was transferred, and I don't know just exactly when he came with the company.

Mr. Moore: All right.

Trial Examiner Whittemore: Thank you.

Mr. Watkins: Wait a moment, please.

Trial Examiner Whittemore: Just a moment; I believe Mr. Watkins has another question.

Redirect Examination

By Mr. Watkins:

Q. Mr. Creek, when you were doing this experimental tool work did you have anybody working under you? A. I did not.

Q. You spoke of Mr. Leatherwood being a setup

(Testimony of James D. Creek.)

man. What was his job on or about July of 1937?

[710]

A. I believe that he was an electric upsetter operator.

Q. Was he a setup man at that time?

A. I couldn't definitely say but I don't believe that he was.

Mr. Watkins: That is all.

Trial Examiner Whittemore: Anything further, Mr. Moore?

Mr. Moore: Just one moment. Will you please read the first question on the redirect examination?

(The record was read.)

Recross Examination

By Mr. Moore:

Q. Ed Fickle was doing experimental tool work too, wasn't he?

A. I believe he took over after I was transferred to sales.

Q. About what date would that be?

A. I believe that was about September of 1938.

Q. He took the job you had been doing?

A. That's right.

Mr. Moore: That is all.

Mr. Watkins: Just one other question.

Redirect Examination

By Mr. Watkins:

Q. Were you in charge of maintenance during any of the time that you were in office in the Alliance?

(Testimony of James D. Creek.)

A. I believe so, possibly the last, I would say probably the last three or four months.

Q. Did you have power to hire and fire any men? A. No, I did not. [711]

CLARENCE MILLMAN,

recalled as a witness by and on behalf of the respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination
(Continued)

Mr. Watkins: Could I have these marked for identification as Respondent's next in order, please?

(Thereupon the documents referred to were marked as Respondent's Exhibits 5, 6 and 7, for identification.)

Q. (By Mr. Watkins): Mr. Millman, I show you a copy of a letter dated June 13, 1942, marked Respondent's Exhibit 5 for identification, and I would like to have you examine that and state whether or not that is a copy of a letter which you sent? A. That is right.

Q. Was the original of that letter either sent by mail or delivered to the executive committee of the Alliance? A. It was delivered. [712]

Q. Delivered personally?

A. By my secretary.

Q. By your secretary? A. Yes.

(Testimony of Clarence Millman.)

Q. Will you please state what was the reason for writing Respondent's Exhibit 5 for identification?

A. Yes. Jim Crank had come into my office——

Mr. Watkins: Just a moment, will you, please. I would like at this time to offer Respondent's Exhibit 5 for identification.

Mr. Moore: I have no objection.

Trial Examiner Whittemore: All right. The document is received.

(Thereupon the document heretofore marked for identification as Respondent's Exhibit No. 5, was received in evidence.)

RESPONDENT'S EXHIBIT No. 5

June 13, 1942.

Executive Committee,
Pacific Motor Parts Workers Alliance,
Bell, Calif.

Gentlemen:

It has been brought to my attention that your committee is engaging in some union activities on company time.

Please understand that while the company does not attempt to prevent any union activity on company property, it does insist that no union activity of any kind be conducted on company time.

The company feels that since you are being paid for eight hours work, it is only reasonable to expect eight hours work from each man, and the company

(Testimony of Clarence Millman.)

does not intend to pay any man for union activity.

Please pass this word to your fellow members, and any person found engaging in union activity during working hours will be subject to disciplinary measures.

Very truly yours,
THOMPSON PRODUCTS, INC.
WEST COAST PLANT,
C. L. MILLMAN,
Personnel Manager.

CLM:CW

Mr. Watkins: Will you read the answer as he has so far given it?

(The record was read.)

The Witness: He said, "Mills, you have heard a report about the C.I.O. activity on company time," he said, "I could give you the names of several P.M.P.W.A. men who are organizing on company time."

I replied, "Jim, the same orders went for each one in the plant, and if the fellows had been doing union activity on company time it was without my knowledge and I would see [713] it was stopped, in so far as it was possible for me to stop it."

That was the reason I wrote the letter to the executive committee.

Mr. Watkins: I might say, Mr. Examiner, that we didn't get them marked in the order I wanted them, but that is unimportant.

(Testimony of Clarence Millman.)

Q. (By Mr. Watkins): After you—please examine Respondent's Exhibit 6 for identification, and I will ask you if that is a copy of a letter you either sent or had delivered to the executive committee of the Alliance. A. It is.

Trial Examiner Whittemore: What date does that bear?

Mr. Watkins: It bears the date of October 16, 1941. I will now offer Respondent's Exhibit 6 in evidence.

Trial Examiner Whittemore: Any objection?

Mr. Moore: No objection.

Trial Examiner Whittemore: It is received.

(Thereupon the document heretofore marked for identification as Respondent's Exhibit 6, was received in evidence.)

RESPONDENT'S EXHIBIT No. 6

October 16, 1941.

To the Executive Committee,
Pacific Motor Parts Workers Alliance,
Bell, California.

Gentlemen:

It has been brought to my attention that a P. M. P. W. A. Committee meeting was held on October 10th, between the hours of 3:30 and 5:30 p.m., which was attended by three members of your Committee after punching in their time cards at 3:30.

It has been the policy of the company to allow

(Testimony of Clarence Millman.)

the labor relations conferences between the Executive Committee of the P.M.P.W.A. and the Management representatives, on company time, in order to allow a Committee member credit for eight working hours in one day.

In other words, if a meeting is called at 2:30 p.m. members of the Committee who are working day shift will be paid the time from 2:30 until 3:30. At the conclusion of the meeting, these men should go to the Foreman and have their cards marked out at 3:30. Members of the Committee who are working the second shift have their cards punched in by the Foreman at 3:30.

The company does not pay for meetings held by the P.M.P.W.A. Committee.

Very truly yours,

THOMPSON PRODUCTS, INC.
WEST COAST PLANT.
C. L. MILLMAN,
Personnel Manager.

CLM:CW

Q. (By Mr. Watkins): Mr. Millman, I show you Respondent's Exhibit 6, and will you tell me what was the occasion for that letter being sent to the executive committee of the Alliance?

A. Mr. Stewart, who is the company's auditor, came to me [714] one day asking me if a union meeting with management had been held on Octo-

(Testimony of Clarence Millman.)

ber 10th. I told him it had not. He said, "Well, several of the boys have checked their time cards out, as attending a union meeting," so I told him it must have been a committee meeting, that they were not to be paid for.

Q. What distinction do you make between a union committee meeting and a meeting with management?

A. Well, a committee meeting is a meeting held among the members of the executive committee to decide somewhat what they want to bring to management's attention. A union meeting with management is one in which we get together with the executive committee across the conference table and discuss the different problems.

Q. Yes. As to the meetings where the committee met with management, did you deduct anything from the employees, members of the Alliance who attended that meeting?

A. Not if the meeting was scheduled to take place during a regular working shift.

Q. In other words, as to any meeting scheduled during a regular working shift, and as to such men who were members of the committee, they were paid for that time. Is that correct?

A. That is right. If a man was working from 3:30 to midnight and the union meeting was scheduled at 3:30, they were paid from 3:30 until such time as they got out of the meeting. [715]

Q. That is true of the executive committee meetings with management?

(Testimony of Clarence Millman.)

A. With management.

Q. Did the management authorize any meetings, union meetings, other than that?

A. Not to my knowledge.

Trial Examiner Whittemore: Off the record.

(Discussion off the record.)

Trial Examiner Whittemore: On the record.

Q. (By Mr. Watkins) I show you, Mr. Millman, Respondent's Exhibit 7 for identification, and will ask you if that is a copy of a document prepared by you and posted, or which you had posted under your direction? A. It is.

Q. What was done with it? Was it given to the foremen and supervisors, or was it posted, or what?

A. It was given to all foremen and supervisors, placed on their time cards.

Q. I show you Respondent's Exhibit 7 for identification and will call your attention to a date at the top of it in red. Is that what you put on there?

A. Yes. I put that on there at the time I placed it on the file. The secretary made up the paper, and left the date off.

Q. Do you know what date the notice was drawn and given to the men? [716]

A. It was June 1st.

Q. June 1st of 1942? A. 1942.

Mr. Watkins: We offer this as Respondent's Exhibit 7 in evidence.

Mr. Moore: No objection.

(Testimony of Clarence Millman.)

Trial Examiner Whittemore: All right. The document is received.

(Thereupon the document heretofore marked for identification as Respondent's Exhibit No. 7, was received in evidence.)

RESPONDENT'S EXHIBIT No. 7

Foreman's Bulletin
Thompson Products, Inc.
6-1-42

To All Foremen & Supervisors:

It has come to my attention that some of the supervisory personnel are engaging in practices which might be construed as coercive in regard to the labor activity which is now going on in our shop.

It must be understood by everyone that the management has no desire whatsoever to participate in any union activity, and the supervisory personnel must be especially careful that they commit no acts or make no voluntary statements which would be considered influencing an employee in his choice of labor representation.

This is an especially crucial time, and it is very necessary that no member of the management group do anything which would place the management in an unfavorable light concerning union activities.

I shall be glad to discuss this personally with any of you at any time you find convenient.

C. L. MILLMAN
Personnel Manager

(Testimony of Clarence Millman.)

Q. (By Mr. Watkins) Mr. Millman, you stated a moment ago with respect to the meetings by the Alliance on company time, that to your knowledge it had never been done. Did meetings of that character on company time come to your attention, for the first time prior to your sending Respondent's Exhibit 6?

A. There was a meeting of October 10th which occasioned this letter, which is the one which was brought to my attention.

Q. Was that the first time this matter had been brought to your attention?

A. That's right.

Q. Has any such matter been brought to your attention subsequent to the date of Respondent's Exhibit 6? A. No, sir.

Q. Mr. Millman, have you ever seen organizers of any outside [717] union near the gates at the plant? A. I have.

Q. Doing what?

A. Handing out literature.

Q. Was any direction of any kind given by you with respect to that operation?

A. Yes. The captain of the guards came in one night and asked me how far they were allowed to go.

Q. Can you state about when this was?

A. January, 1942.

Q. Yes.

A. And I told the captain that he do nothing as

(Testimony of Clarence Millman.)

long as they stayed off company property. They were not allowed to come inside the gates.

Q. In other words, they were not to be on company property inside the gates?

A. That is correct.

Q. But nothing was to be done about it as long as they stayed outside. Is that correct?

A. That is right.

Q. Did the Alliance at any time request of you any list of employees? A. They did.

Q. Can you state, first, of what character?

A. They asked for a list of new employees as they were hired. [718]

Q. Yes. Do you remember about when this was?

A. I believe that was probably—I don't know; it would have been October or November of '41.

Q. Do you remember who asked you, specifically? A. Mr. Baldwin.

Q. Do you remember what you stated to him?

A. I told him I wouldn't give him any list of employees.

Q. Was anyone present at this conversation besides you and Mr. Baldwin?

A. I believe not.

Q. Did you ever furnish Mr. Baldwin or anyone connected with the Alliance with any list of new employees? A. No.

Q. Mr. Millman, I believe that Mr. Elmer Smith testified that some time in November or December of 1941 you made a statement to the effect that be-

(Testimony of Clarence Millman.)

fore the company would recognize the C. I. O. it would close its plant and move back to Cleveland. Do you ever remember any conversation to that effect with Mr. Elmer Smith? A. I do not.

Q. Would you say whether or not you ever made such a statement to him? A. I never did.

Q. Either stating that, or that in substance?

A. That is right. [719]

Q. Did you ever make such a statement to anyone? A. No.

Q. Did you make any statement in form or substance that you would go through a strike before you would submit to the C.I.O.? A. No, sir.

Q. Either to Mr. Elmer Smith or to anyone else? A. To no one.

Q. You have an employee named Mr. Weisser?

A. Weisser, W-e-i-s-s-e-r.

Q. Is that the correct spelling of it?

A. That is right.

Q. What is his official capacity at the present time?

A. Supervisor of heat treat department.

Q. How long has he been in that position?

A. About two years.

Q. What did he do prior to that, do you know?

A. He was a heat treater.

Q. A heat treater; he had no supervisory duties?

A. No.

Q. What about Mr. Beach? What is his full name? A. Glen Beach.

(Testimony of Clarence Millman.)

Q. What is his present position?

A. He is supervisor in the maintenance department.

Q. How long has he been in that capacity? [720]

A. About two years.

Q. What did he do prior to that time?

A. He was a maintenance man, and electrician.

Q. Prior to that time did he have any supervisory capacity?

A. He was called the chief electrician.

Q. Did he have any power to hire or fire men?

A. No.

Q. You also have an employee name Little. Is his name Charles Little? A. That is right.

Q. What is his capacity at the present time?

A. He is a tool grinder.

Q. A tool grinder? A. That is right.

Q. Does he have any men under him, any men who he is in charge of? A. No.

Q. Has he ever been in a supervisory capacity of any character? A. No.

Q. Did you hear the testimony here, Mr. Millman, about some obscene instrument or lewd instrument which was displayed at the plant some time back? A. Yes, I did.

Q. When did you first hear about the incident after it [721] occurred at the plant?

A. It was on a Monday morning.

Q. From whom did you first hear about it?

A. From the captain of the guard.

(Testimony of Clarence Millman.)

Q. What was stated to you?

A. He told me that the object had been displayed in the shop the day before, on Sunday, and that Mr. Leatherwood had had it.

Q. Did the guard say to you what happened or what the result was of the display of this instrument?

A. He said there was a great deal of laughter about it. That's all.

Q. What did you do about it?

A. I went to Mr. Kearns, who was general manager; I told him I understood one of the foremen had been seen displaying this object; that it would be a very good idea for him to stop this display of the object, because I didn't want any member of management to be showing such a thing, and that it took too much time.

Q. Did you check with Mr. Kearns after that to see what had happened about it?

A. The next morning.

Q. What did he say?

A. He told me he had stopped it.

Q. Mr. Millman, are you aware that some of the membership [722] meetings of the Alliance were held on Sundays? A. Yes.

Q. Do you know when they first started, approximately?

A. They have been held on Sundays ever since I have been with the company.

Q. Was there any request made of you by any-

(Testimony of Clarence Millman.)

body from the Alliance to work out shifts conveniently for the Sunday meetings of members of the Alliance?

A. No, sir, no request was made to me.

Q. Do you know whether or not any arrangement was made by the company to make any change in shifts for those Sunday meetings?

A. I believe an arrangement was made with Mr. Kearns, general superintendent.

Q. You personally are not familiar with what it was? A. No.

Q. Do you know whether or not you had full operation on Sunday?

A. No, there was a skeleton shift.

Q. Only a skeleton shift during this period on Sundays? A. That is correct.

Q. You still only have a skeleton shift on Sundays?

A. It is considerably larger than it was then, but it is not a full shift.

Q. Mr. Millman, I will show you Board's Exhibit 9 and that is [723] the one that refers to certain employees perhaps being ineligible to participate in the Alliance. I will ask you whether or not you got that out and what the occasion for it was.

A. Yes, I put the notice out. It was either Mr. Smith or Mr. Baldwin who came to me one morning saying that several of the men who were considered supervisory employees were engaging in union activities at the election; they were at that time members of the Alliance. After some discus-

(Testimony of Clarence Millman.)

sion of it they suggested some of the fellows who were at the meeting, that they were referring to—it was decided they had better have those fellows resign.

Q. With respect to these names which appear on Board's Exhibit 9, did any of them at this time have the power to hire or fire?

A. No, none did.

Q. In other words, the Alliance approached you on it and said they felt they were considered supervisors by the management and should be out, and that was what——

Mr. Moore: One moment, please. I object to that as not being in accordance with his testimony.

Trial Examiner Whittemore: I will sustain the objection.

Mr. Watkins: I will strike the question. I understood him to say Mr. Baldwin came to him.

Trial Examiner Whittemore: He said Mr. Baldwin or Mr. [724] Smith.

Mr. Watkins: I see.

Q. (By Mr. Watkins) Can you identify with any more certainty who it was came to you concerning it? A. No, I can't.

Mr. Watkins: I think that is all.

Cross Examination

Q. (By Mr. Moore) Mr. Millman, does the company operate a benefit fund for the benefit of its employees?

A. No. Just what do you mean by a benefit fund?

(Testimony of Clarence Millman.)

Q. Well, I was going to ask you what the benefit fund is. You do have a benefit fund, do you not?

A. There is an old guard welfare fund.

Q. You don't have anything that you call a benefit fund? A. No.

Q. Did you have in 1941? A. No.

Q. Wasn't an election held between the old guard and the Alliance to see which one was going to operate the benefit fund?

A. There was, yes.

Q. What was that fund that you were trying to make a decision on?

A. That was a fund which they wanted to set up.

Q. Who wanted to set up? [725]

A. Well, the boys in the shop. It was designed to pay a man—well, they had paid dues, at first, of a dollar a month, or whatever they decided on. Then, for an employee who was sick for three or four days he would be paid two or three dollars a day out of the benefit fund to take care of his lost wages and it would take care of a man who had been injured in an accident in the shop, take care of the first week before his workmen's compensation started.

Q. Who first suggested it might be a good plan to have such a fund?

A. I think the plan had been in effect several years before.

Q. Where? A. In the shop.

Q. It had become dormant? A. Yes.

(Testimony of Clarence Millman.)

Q. Was such a fund set up in 1941?

A. No.

Q. Never has been? A. Never has been.

Q. Will you describe this election that was held between the Old Guard Association and the Alliance?

A. Well, there were some of the fellows in the shop felt the Old Guards should handle it so each one would be eligible to belong to it. If the union held it no one but union members would be allowed to join it. The election was held [726] to make a decision, to decide which organization would run the benefit fund.

Q. What type of ballot was used on that?

A. It was a mimeographed ballot explaining the benefit fund, and with blank spaces for them to mark whether they wished the Old Guard to have it or the union to have it.

Q. Were those mimeographed ballots passed out to all employees? A. Yes.

Q. Which organization won in that election?

A. The Old Guards.

Mr. Watkins: I submit, Mr. Examiner, this has no bearing on the issues involved here, and I object to it on that ground.

Trial Examiner Whittemore: I do not see the materiality.

Mr. Moore: I think it does. Mr. Millman has not described the Old Guard Association yet. I think when he does the materiality of it will be plain.

(Testimony of Clarence Millman.)

Trial Examiner Whittemore: Well, is this to be brief?

Mr. Moore: Yes. I am just going to ask him now to describe the Old Guard Association, and that will conclude it.

Trial Examiner Whittemore: All right.

Q. (By Mr. Moore) What is the Old Guard Association?

A. It's an honorary organization of employees who have been with Thompson Products for five years or more. It is divided up into various classes: Five, ten, fifteen years, and on up [727] to 25. There are pins given to designate the class. A man automatically belongs to the Old Guard Welfare Association if he has completed five years service.

Q. Is there an Old Guard Welfare Association too?

A. Well, it's the Old Guard Association, is the title of it.

Q. I see. Any member of the company may belong to that? A. Oh, yes.

Q. It has no collective bargaining purposes?

A. No.

Q. Will you describe what bulletin boards are now in the plant?

A. There are, there is the company bulletin board, which is placed right outside of my office; there is a union bulletin board just alongside the company's bulletin board, and there is a safety bulletin board.

(Testimony of Clarence Millman.)

Q. Where is that?

A. Well, it is along the same corridor but perhaps 50 feet down.

Q. Are there headings on the bulletin boards to indicate clearly which is which? A. Yes.

Q. The name of the union is on one. Is that right? A. That's right.

Q. And the name of the company is on another?

A. That is right. [728]

Q. Is there a heading on the other bulletin board?

A. A heading has been made up. I don't know whether it has been placed or not.

Q. You testified to a conversation with Mr. Crank and you stated he came in to complain about activities of the Alliance. Did you give the entire conversation that was had on that occasion?

A. Mr. Crank opened the conversation with a protest against the obscene object. I told him that had been taken care of, that I had stopped it, so far as I was able. He then told me that—well, the conversation I have related about union activity; that was all.

Q. Then what did you say?

A. That was all the conversation.

Q. Nothing was said about his criminal record?

A. Oh, yes. Yes. I just received Mr. Crank's fingerprints from the F.B.I., for the fingerprint record, and I asked him to give his version of what was shown in the fingerprint record which I had.

Q. What was shown?

(Testimony of Clarence Millman.)

A. It was shown that on one occasion in Loveland, Colorado, he had been picked up by the police, with no disposition made. A few days later it was shown to be he was put in the State Reform School, and I have forgotten the name of it. It's in Colorado; and on one occasion after that, recently, I [729] believe in 1941, he had been picked up in Long Beach on suspicion of car theft.

Q. Was there any particular reason for your discussing that with him at that time?

A. I discussed it with all employees who had fingerprint records.

Q. You would have called him in, in due course, and discussed it with him? A. That is right.

Q. Mr. Millman, are you familiar at all with the company's accounting records?

A. Well, from my only contact with them, which is usually the time cards.

Q. Do you know whether or not the time men spend on various jobs is charged to a particular account? A. It is.

Q. To what account is the time spent in these council management meetings charged?

A. Well, I don't know the exact name of the account.

Q. Do you know whether or not time spent at committee meetings just among members of the Alliance committee has been charged to that account? A. Not that I know of.

Q. That bulletin to the supervisory employees,

(Testimony of Clarence Millman.)

was that put out just after that obscene object was displayed around [730] the plant?

A. May I see the bulletin?

Q. It is Respondent's Exhibit 7.

A. Yes, that was what it concerned.

Q. Would you say about two days after?

A. I wouldn't say the exact date or the exact length of time; it was shortly after; it was still fresh in my mind.

Q. Was that the immediate event that called this forth? A. That is right.

Q. Was there anything else that this was intended to stop?

A. It was intended generally to review in the foremen's and supervisors' minds the fact they were to keep their hands off any union business.

Q. There was nothing specific, though, except this——

A. Except the obscene object.

Q. What is the first name of the man named Weisser, that you have testified about?

A. It is Charles E.

Q. Is he called Ted? A. That is correct.

Q. He was a member of the executive council of the Alliance for some time, was he not?

A. Yes, he was.

Q. Was he a supervisor at the time he was a member of that?

A. Well, he was not then considered so by the management. [731]

(Testimony of Clarence Millman.)

Q. What did you say was the occasion for the posting of Board's Exhibit 9?

A. That was either Mr. Smith or Mr. Baldwin, I am not sure which, who had come into my office reporting that these men had attended union meetings. They didn't feel, since they were considered supervisory by the employees, they didn't feel they should be allowed to attend union meetings.

Q. Did you draw up the wording of this notice?

A. Yes, I did.

Q. Did you have in mind a National Labor Relations Board's ruling, or was that just a convenient way to start?

A. No, I had seen one, a report on one from one of the manufacturers' associations.

Q. How long before you posted this had you seen that?

A. You have got me there; I don't know.

Q. Well, was it a considerable time?

A. It was within a few weeks.

Q. Within a few weeks?

A. That is right; three, maybe four weeks.

Q. How was it this was not posted at the time you saw that?

A. In the month of September I had been ill. I was in the hospital for a little over a week and when I came back to work, I only worked about three hours at a time for the month of September. When I finally began to spend all my time at my desk, it was piled about so high (indicating), and it was just [732] carelessness that I never got

(Testimony of Clarence Millman.)

around to do it until it was brought forcibly to my attention by the men on the committee.

Q. I will ask you this question: Did the work of any of these men change at the time this notice was posted? Did their duties change?

A. No.

Q. Did their duties change anywhere near the date this was posted? A. No.

Q. Within a few months? A. No, no.

Q. They continued to perform the same duties after that which they had before?

A. But they were from then on considered part of the supervisory force.

Q. (By Trial Examiner Whittemore) Let me get that clear: They were on the supervisory force before this time?

A. The management until then had not so considered them.

Q. They were doing the same work?

A. That is right.

Q. But the management changed its mind as to what their duties were at that time?

A. The rulings which the Labor Board had put out at that time—the management had not considered them as part of the [733] management force, because they did not have the right to hire and fire. But the rulings of this particular case—I don't remember the details—the Labor Board had decided as long as a man had laid out work and was considered in the eyes of the employee as a super-

(Testimony of Clarence Millman.)

visor, or part of management, that he was responsible for management's actions.

Q. (By Mr. Moore) Have you ever taken any disciplinary action as a result of the instruction contained in Respondent's Exhibits 5, 6 and 7?

A. Which ones are they now?

Q. They are the two letters, and the notice. I will show them to you.

A. Oh, yes. No, we haven't.

Q. Do you know when the original charge in this case was filed? Was it before or after Respondent's Exhibits 5 and 7 were issued?

Mr. Watkins: It was in the year of 1941, around about that, wasn't it?

The Witness: By the original charge you mean with the Labor Board here?

Mr. Moore: Yes.

The Witness: Oh, that was, I think that was in May of 1942.

Mr. Watkins: The reason I asked that, Mr. Examiner, is that the question is misleading. One of the letters is dated [734] October 16, 1941 and the other was in 1942.

Mr. Moore: I said Respondent's Exhibits 5 and 7.

Mr. Watkins: I am sorry.

The Witness: I thought you meant all three of them.

Q. (By Mr. Moore) They were filed before either exhibits 5 or 7 were issued? A. No.

(Testimony of Clarence Millman.)

Mr. Moore: May we have the last question and answer?

The Witness: Yes. I think I am a little confused about it myself.

Trial Examiner Whittemore: Does the record show when the original charges were filed?

Mr. Moore: It is not part of the formal exhibits.

Trial Examiner Whittemore: Well, do you know? Can Mr. Watkins stipulate to that, then? I don't think you need to ask the witness, because it would be perfectly apparent.

Mr. Moore: The purpose of my question was to make it apparent. I don't have the date right here, but I can get it in a moment.

Trial Examiner Whittemore: Well, why don't you get it? That will take care of it; unless the witness knows. Do you know?

The Witness: No, sir. I think it was in May.

(A short recess was taken.)

Mr. Moore: May it be stipulated the original charge in [735] this case was filed May 1st, and that the company was notified by letter mailed to them dated May 1, 1942?

Mr. Watkins: Yes, it is so stipulated.

Trial Examiner Whittemore: What was that date?

Mr. Watkins: May 1, 1942. I think it should also be stipulated, Mr. Moore, that the letter sent to the company did not detail the charges with respect to this matter that is now being discussed. It was just general.

(Testimony of Clarence Millman.)

The Witness: That was the Hess case, wasn't it?

Mr. Moore: I will agree to the stipulation.

Q. (By Mr. Moore) Does Mr. Charles Little have any helpers? A. No, not now.

Q. What is his rate of pay?

A. It's about a dollar—it's probably about a dollar five.

Q. What is his payroll classification?

A. Tool grinder.

Q. Do you have any other tool grinders who are receiving that much pay?

A. I don't think so. The others are quite new men. There is only one other.

Q. Did Mr. Charles Little ever discuss with you the competency of any men working in the tool crib?

A. No.

Q. He never did? A. No. [736]

Q. Did you ever ask him whether or not they were competent? A. No.

Q. Do you know whether or not he leaves written instructions for men coming into the tool crib on the shift succeeding the one on which he works? A. I don't know.

Q. Do his duties require him to do that?

A. He is no longer in the tool crib.

Q. In 1941, did his duties require him to do that?

A. I don't know. I don't think so.

Q. Do you know about how often the Alliance has held meetings of its full membership?

(Testimony of Clarence Millman.)

A. Recently I believe they have held them about once a month.

Q. In your experience was it always on Sunday?

A. Yes.

Q. Have you ever discussed with Mr. Kearns any arrangement to be made so that the men may be off during the time those meetings are in progress?

A. Yes. About a month ago they were holding their elections. Mr. Kearns said that they had requested that the plant be closed, or else a skeleton shift, so that all men could attend the election.

Q. Did he say who requested it?

A. No, he said the union has asked. [737]

Q. Was that matter of closing down for a period on Sunday so that the men could attend meetings ever made the subject of collective bargaining, in any executive council-management meeting?

A. I don't believe so. I don't have any recollection of it.

Q. Not, at least, in any meeting that you attended? A. That is right.

Q. Have you attended most of them since you have been there?

A. I have attended, I believe, all of them since I have been there.

Q. When did you go there?

A. September 16, 1940.

Q. How are the men notified that a different shift will be working on Sunday when it is planned to shut the plant down for a short period of time?

A. I wouldn't know.

(Testimony of Clarence Millman.)

Q. You don't know how they are notified?

A. No.

Q. Back in 1941 did the men request to be allowed to work on Sundays?

A. Occasionally yes. There was quite a lot of argument about who would work on Sundays. It's an overtime day.

Q. You worked just a skeleton shift, you said, didn't you? A. That's right.

Q. And do you know what method was used to pick these men [738] that were going to work these shifts? A. By the work that was needed.

Q. And you do not know what method was used to notify them that the modified shift would be worked on days when an Alliance meeting was scheduled?

A. Well, I know what method was used when they were notified to work on Sundays; but so far as any notification as to whether the shift would be changed for the union meetings, I wouldn't know anything about that.

Q. What hours did the shift run on days when there were Alliance meetings?

A. I don't know that; so far as I know it was still 7:00 to 3:30.

Q. The same as days on which there were no meetings? A. That is right.

Q. You mean, then, the men that worked on Sundays would only work, say, five hours instead of seven?

Mr. Watkins: Just a minute. I think you are

(Testimony of Clarence Millman.)

putting words in the witness' mouth, and misconstruing the testimony of Mr. Millman, and I object to the question on that ground.

Trial Examiner Whittemore: The witness will testify what he means. I will overrule the objection.

The Witness: May I have the question read?

Mr. Moore: I will restate it for your benefit.

Q. (By Mr. Moore) On Sundays when the Alliance held [739] meetings and the plant closed down for a period, did the men work as many hours as they did on Sundays when no Alliance meeting was held?

A. I believe in some cases they did.

Q. So that they started earlier on those days?

A. Possibly, or they may have worked later.

Q. Do you know? A. I don't know.

Q. Are you there on any Sundays when the work is in progress? A. Lots of Sundays.

Q. What time did you go to work when an Alliance meeting was scheduled?

A. I have never gone to work on Sundays. My only contact has been to stop by the plant for some specific work.

Mr. Moore: I have no further questions.

Mr. Watkins: That is all.

Trial Examiner Whittemore: Just a moment, please.

Q. (By Trial Examiner Whittemore) How is the work of the supervisor of maintenance carried out?

(Testimony of Clarence Millman.)

A. He has his men divided up into crews of two or three men. He lays out the work each one of the crews will do.

Q. And he makes a continual check to see how the men are getting along? He orders the supplies for that department in that plant?

A. That is it. [740]

Q. And he is responsible for these men under him? Is that it? A. That is right.

Trial Examiner Whittemore: All right.

Mr. Watkins: No questions.

(Witness excused.) [741]

JAMES D. CREEK

resumed the stand and further testified as follows:

Mr. Baldwin: I would like to have these marked for identification.

Trial Examiner Whittemore: They will be marked Alliance Exhibits 1 and 2.

(Thereupon the documents referred to were marked as Alliance Exhibits Nos. 1 and 2, for identification.)

Direct Examination
(Continued)

By Mr. Baldwin:

Q. Will you identify Alliance's Exhibit 1?

A. I can.

Q. To what has it reference?

(Testimony of James D. Creek.)

Trial Examiner Whittemore: First ask him what it is.

Q. (By Mr. Baldwin) What is this, Mr. Creek?

A. It is a check drawn on the account of Pacific Motor Parts Workers Alliance account.

Q. To whom is it made out?

A. To L. A. Porter.

Q. Is that your signature on there?

A. It is.

Q. Could you possibly recall what it was for? [744]

A. As I recall it was for some cards, and I believe the rental of some chairs or something, of that order, that was furnished at one of these meetings we had in Maywood at the electrical shop, for some incidental expense.

Mr. Baldwin: I would like to offer this in evidence. Will you mark this for identification.

(Whereupon the document referred to was marked Alliance's Exhibit No. 3 for identification.)

Trial Examiner Whittemore: Do you have any objection, Mr. Moore?

Mr. Moore: No objection to No. 1.

Trial Examiner Whittemore: Mr. Watkins?

Mr. Watkins: No.

Trial Examiner Whittemore: All right. The document is received.

(Whereupon the document heretofore marked Alliance's Exhibit No. 1 for identification was received in evidence.)

90-975 BELL BRANCH 90-975

NATIONAL LABOR RELATIONS BOARD

CASE NO. XVI-C-[illegible] | BOARD EXHIBIT NO. [illegible] | IN THE MATTER OF Hoopes Bros.

DATE 10/14/37 PAY TO THE ORDER OF WITNESS

ETHEL E. FISHER, OFFICIAL REPORTER

BY [illegible]

Bank of America

NATIONAL TRUST & SAVINGS ASSOCIATION

BELL, CAL. Aug. 22 1937

No. 3

S. A. Porter.

$ 4 52/xx

Four 52/xx DOLLARS

Pacific Motor Part Workers Alliance

James W. Creek Pres.

Dean Gardner Sec. & Treas.

Alliance Co 1-19

T.A.P.C.C.
6029 Slauson

6
PAY TO THE ORDER OF
SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES
Joe Tedesco
6

SEP 2 1937

60-603
LOS ANGELES, CALIF.

1123

(Testimony of James D. Creek.)

Q. (By Mr. Baldwin) Can you identify Alliance's Exhibit No. 2? A. I can.

Q. What is it?

A. It's a check drawn on the Pacific Motor Parts Workers Alliance account.

Q. And to whom is it made out? [745]

A. To Schooling & Wayte.

Q. Can you state what it was for?

A. It was for services rendered by their firm in drawing up a constitution for the Alliance.

Q. Is that your signature on there?

A. It is.

Mr. Baldwin: I would like to offer this.

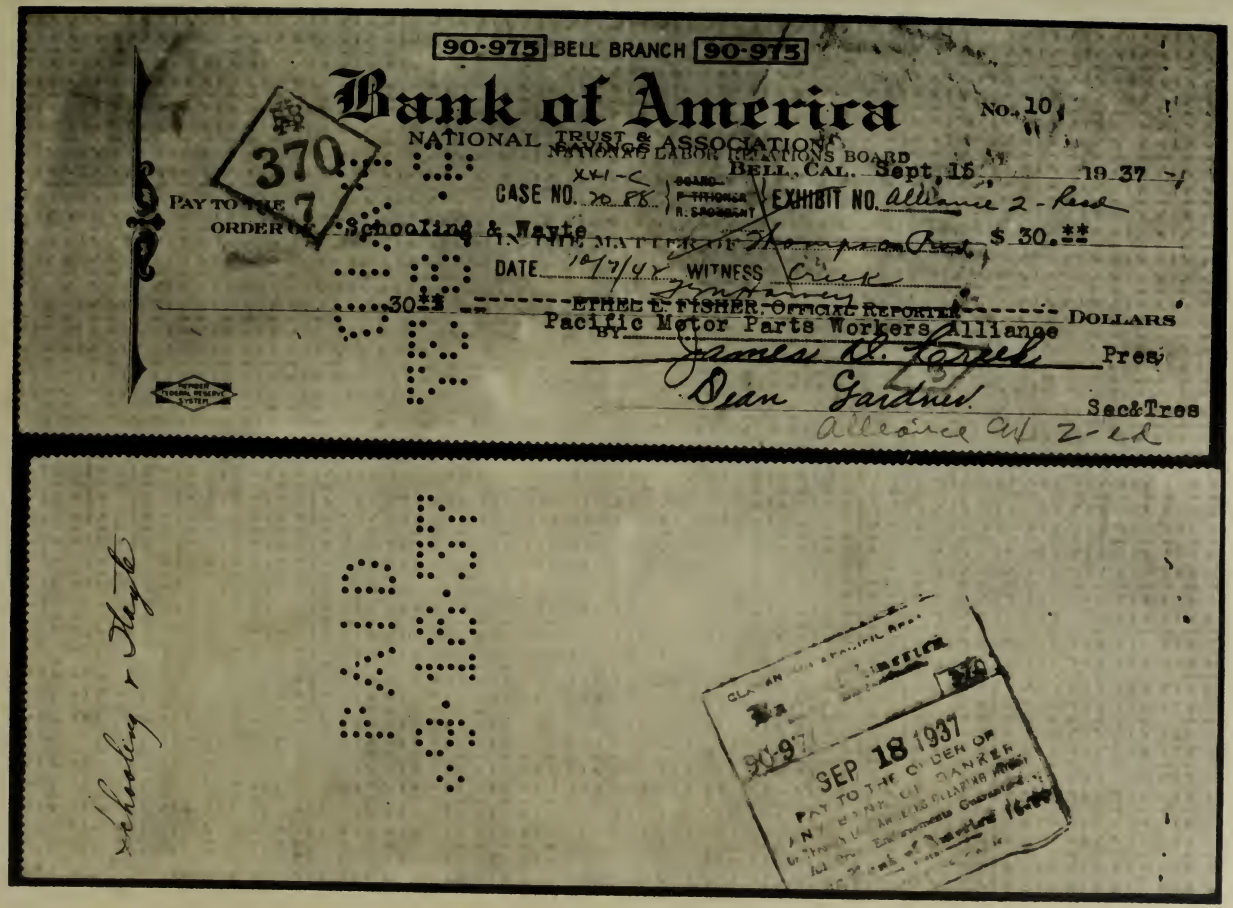
Trial Examiner Whittemore: Is there any objection, Mr. Moore?

Mr. Moore: No objection.

Mr. Watkins: No objection.

Trial Examiner Whittemore: All right. The document is received.

(Whereupon the document heretofore marked Alliance's Exhibit No. 2 for identification was received in evidence.)



90-975 BELL BRANCH 90-975

Bank of America

NATIONAL TRUST & SAVINGS ASSOCIATION

No. 10

NATIONAL LABOR RELATIONS BOARD

Bell, Cal. Sept. 15 1937

370
7

XV-1-C

CASE NO. 20 88 | BOARD P. TITIONER R. SPONDENT | EXHIBIT NO. Alliance 2 - Resp

PAY TO THE ORDER OF Schooling & Wayte $ 30.00

IN THE MATTER OF Hampton Rest.

DATE 10/7/37 WITNESS Creek

Gartner

30.00 ETHEL D. FISHER, Official Reporter DOLLARS

Pacific Motor Parts Workers Alliance

BY James O. Lorek Pres.

Dean Gardner Sec&Tres

Alliance Ex 2-22

Schooling & Wayte

CLAIM AND AUDITOR'S ADVICE

Re

90-97

SEP 18 1937

PAY TO THE ORDER OF

ANY BANK OR BANKER

Endorsements Guaranteed

All Prior Endorsements and/or Lack of Endorsements Guaranteed

1126

(Testimony of James D. Creek.)

Q. (By Mr. Baldwin) Can you identify Alliance's Exhibit 3? A. Yes, I can.

Q. What is it?

A. It is a card that was turned in to me in regard to these cards and chair rentals, covering this check to L. A. Porter.

Q. Do you know who turned that card in to you?

A. As I recall, Mr. Porter turned it in to Mr. Gardner, our secretary at that time, and requested payment for these items. [746]

Q. Did you pay Mr. Porter for those items?

A. We did.

Mr. Baldwin: I offer this in evidence.

Trial Examiner Whittemore: Any objection, Mr. Moore?

Mr. Moore: No objection.

Trial Examiner Whittemore: Mr. Watkins?

Mr. Watkins: No objection.

Q. (By Trial Examiner Whittemore): Was this made out by Porter?

A. As far as I know. He was the one turned it in, and as far as I know he made that up and presented it to us requesting payment for those items.

Q. Who did he pay it to, do you know?

A. Dean Gardner, the secretary. He turned it to us and asked if we wanted to make payment, and I told him we would, and we did. It is covered by that check.

Mr. Baldwin: You might compare the signature at the top and the endorsement of the check. And it might help you some.

(Testimony of James D. Creek.)

Trial Examiner Whittemore. All right. The document is received.

(Whereupon, the document heretofore marked Alliance's Exhibit No. 3 for identification, was received in evidence.)

ALLIANCE EXHIBIT No. 3

L. A. Porter, Pd.

Application cards	$3.35
Chair rent	1.00
Card box	.24
	4.59

Q. (By Mr. Watkins): Mr. Creek, I show you Board's Exhibit 6, which is an application card for membership in the Alliance, [747] and I will ask you whether or not you know whether this Alliance's Exhibit 1 was in payment for the cards like that?

A. It was.

Q. Mr. Creek, did Mr. Lewis Porter have any active part in the formation of the Alliance during any of the period you were associated with him? A. He did not.

Q. If you had been told that Mr. Porter was one of the leaders of the Alliance what would your attitude have been?

Mr. Moore: I object to that.

Trial Examiner Whittemore: I will sustain the objection.

Mr. Watkins: Mr. Examiner, I would like to be heard on it if I may, before the ruling.

(Testimony of James D. Creek.)

Trial Examiner Whittemore: All right.

Mr. Watkins: I feel that it is rather important in getting at the seat of the problem here, as to the attitude of the men if they had thought Mr. Porter had anything whatsoever to do with this matter. I think it goes to two points; one is the general way that Mr. Porter was regarded in the plant by the other men, evidence of which has been blocked off before by the Examiner by formal rulings; second, is whether or not the men had any knowledge whatsoever of any participation by Mr. Porter, and if they had knowledge, whether or not they had been suspicious of it.

Trial Examiner Whittemore: I have no objection to your [748] asking if they have knowledge. But my ruling there was simply on as to what his attitude might have been if he had had that knowledge; it could be only purely speculation anyway at this time, five years from the time this happened.

Mr. Watkins: That is one of the difficulties. There is too much speculation five years back. We have complained about that all the way through.

Trial Examiner Whittemore: There has been no speculation as to the facts. The speculation would be as to his attitude five years ago. You know yourself it is extremely difficult for anyone under the most simple conditions; but to speculate as to an attitude, that is objectionable.

Mr. Watkins: My argument was made with respect to the question I asked.

(Testimony of James D. Creek.)

Trial Examiner Whittemore: I have no objection to your asking questions as to the facts, or even as to what his attitude might have been under certain facts. But I don't care to have speculation on what his attitude might have been under certain facts which this witness testified do not exist.

Mr. Watkins: All right.

Q. (By Mr. Watkins): Mr. Creek, if Mr. Lewis Porter had instituted this independent union movement, what would your attitude have been with respect to the independent?

Trial Examiner Whittemore: That is the same thing, Mr. Watkins. [749]

Mr. Moore: I will object to that.

Trial Examiner Whittemore: I will sustain the objection.

Mr. Watkins: No further questions.

Recross Examination

By Mr. Moore:

Q. Did you ever talk to Mr. Porter about payment for those cards?

A. I don't believe I ever did, personally, no.

Q. Do you know where he got the cards?

A. I don't believe he told me that.

Q. How do you know he had them printed?

A. I don't know that he had them printed.

Q. Why did you pay for them?

A. Well, the cards were there.

Q. Somebody must have had them printed. Is that right?

(Testimony of James D. Creek.)

A. Evidently, and when he presented his bill for them I had no way of refusing payment on them, because the cards had been presented to me.

Q. No one else ever presented a bill for them?

A. It was presented to the secretary, Dean Gardner, who had turned the cards over to me, so naturally, I would assume we had taken care of the matter.

Q. You would have assumed that Dean Gardner had ascertained the bill was genuine?

A. That is true.

Q. Did anyone else ever present a bill during that period [750] for having cards printed?

A. Not for having cards printed, no.

Q. When did you change the heading or the name that appears on your membership cards?

A. It was actually changed at the—well, the final name as it was accepted, at the second meeting with the attorney.

Q. Was that before the constitution and bylaws had been signed, or after that?

A. That was before.

Q. When did you have the cards printed with the present name on them?

A. I don't recall the exact date. It was immediately after the organization was formed, the constitution was signed, and all. I believe I would be safe in saying during that week or the following week that I had the cards printed, the membership cards.

Q. You had them printed yourself?

(Testimony of James D. Creek.)

A. I did.

Q. And you paid for them by check?

A. That's right.

Q. Where did you have them printed?

A. At Huntington Park, The Signal, in Huntington Park.

Q. At a newspaper? A. That's right.

Q. Did you ever call in the old style cards and issue new [751] ones to replace them?

A. After this thing was actually started and the signatures were on the constitution, we practically quit using these application cards.

Q. Which type of card was it that you presented to Mr. Livingstone when you demanded recognition of the Alliance?

A. It was this card; the one we have on exhibit.

Q. The one that is Board's Exhibit 6?

A. I believe that is the number. It's the card shown me awhile ago.

Q. Yes. How many members did you have at the time you showed those to Mr. Livingstone?

A. I don't recall exactly, but I believe it was somewhere around 55.

Q. About what percentage was that?

A. As near as I remember, it was about 70 per cent.

Q. About 70 per cent?

A. Roughly speaking.

Q. You say Lou Porter, according to your ob-

(Testimony of James D. Creek.)

servation, was not active in the formation of the Alliance?

A. Well, if I may, I would like to have the last question Mr. Watkins asked and my answer read. I want to be sure I was clear on that.

Mr. Moore: Very well. May we have the record read?

Trial Examiner Whittemore: All right. [752]

(Whereupon, the question was read:

"Q. Mr. Creek, did Mr. Lewis Porter have any active part in the formation of the Alliance during any of the period you were associated with him?

"A. He did not.")

The Witness: That first part was what I had reference to. That's what I wanted clear. During my time in the organization of this, Porter did not have anything to do with it.

Q. (By Mr. Moore): He did have cards printed, though? A. That was before my time.

Q. You think the cards were printed before this?

A. They were printed before I attended the first meeting in Maywood.

Q. Were you convinced at the time this bill was presented to you that Mr. Porter had had cards printed?

A. I felt I could rely on that, inasmuch as the secretary of the organization told me the cards had been printed.

(Testimony of James D. Creek.)

Q. Your statement then that he was not active at all in the formation of the Alliance will have to be changed somewhat, will it not?

Trial Examiner Whittemore: That wasn't your testimony.

The Witness: I wouldn't say so. He might have been acting simply as a messenger boy, to pick up the cards. So far as I know, he didn't have the cards printed. He simply picked up the cards, turned them over to us, evidently paid for them [753] out of his own pocket, and we reimbursed him.

Q. (By Mr. Moore): Do you recall Mr. Porter being at the first meeting?

A. He was not, to my knowledge.

Q. Do you know on what day of the week the meeting was held?

A. I don't know the day of the week, but I believe it was July 29, 1937.

Q. Was Ray Hailey there? A. He was.

Q. Was he there when you arrived?

A. He was.

Q. Did he leave at any time during the evening?

A. Not to my knowledge.

Q. Was Mr. Porter at the second meeting?

A. I couldn't say for sure positively; he might have been.

Q. Is it at the second meeting you recall the constitution was signed? A. That's right.

Q. Do you know whether or not he signed the constitution?

(Testimony of James D. Creek.)

A. I don't know if he signed it, and if he did I don't know he signed it there. All the signatures on the constitution were not obtained at that second meeting.

Trial Examiner Whittemore: Didn't you testify yesterday they were all made at this meeting?

The Witness: I don't think so. [754]

Trial Examiner Whittemore: Some one of the witnesses called yesterday testified they were all made at that meeting.

Mr. Moore: That is my recollection.

Trial Examiner Whittemore: You are sure you didn't testify the signatures were made at the meeting?

The Witness: Pretty sure.

Trial Examiner Whittemore: The record will show.

Mr. Moore: In view of that, I think I should ask two or three more questions on that.

Trial Examiner Whittemore: All right.

Q. (By Mr. Moore): About how many signatures did you get at that August 3rd meeting?

A. As I recall there were about 43.

Q. Where were those signatures placed, with reference to the typed portion of the document?

A. I believe it was at the end, following the end of the typed part. I don't recall.

Q. Did you start right under the last typing and get signatures in rotation? That is to say, did you place the first signature right under the typing and the next signature right after?

(Testimony of James D. Creek.)

A. Right on down; that is right.

Q. Do you recognize this signature which appears on the first page of signatures in Board's Exhibit 3, at about line 25, as that of L. A. Porter? [755]

A. It seems to be, yes.

Q. Could you compare it with Alliance's Exhibit 1 and say whether or not it is?

A. It seems to be approximately the same.

Q. With Mr. Porter's signature in that position with reference to the remaining signatures, would your testimony be that he was at the meeting or that he was not?

A. I would say that he was at that second meeting after seeing his signature in that position.

Q. Let me ask you: Was the portion of the constitution reading: "Signed this 3rd day of August, 1937, at Maywood, California," inserted after the signatures had been obtained?

A. No, I would say that it was put on there before. That is my handwriting.

Q. Do you recall crowding that portion of those words: "At Maywood, California," in between the first signature and the line above?

A. Well, that would be hard to say.

Mr. Moore: That is all.

Mr. Watkins: Mr. Baldwin.

HOWARD BALDWIN

resumed the stand, and testified further as follows:

[756]

Trial Examiner Whittemore: You have already been sworn?

The Witness: Yes, I have.

Cross Examination
(Continued)

By Mr. Watkins:

Q. How long have you been employed at Thompson Products, or at Jadson, its predecessor?

A. About two and a half years.

Q. What type of work do you do?

A. Electrician.

Q. Electrician? A. Electrician.

Q. How long have you been president of the Alliance?

A. A little less than a year.

Q. Has anyone in your family had any active part in labor organizations prior to this?

A. Well, yes; my grandfather started Local No. 2 in Chicago; that is the Theatrical Stage Hands Local, and my dad has been in that organization for about 35 years, I believe.

Q. That is the American Federation of Labor?

A. Yes.

Q. Mr. Baldwin, did you ever hear a statement made by anyone connected with management of Thompson Products, or Jadson Motor Parts Company, to the effect that if either the A. F. of L. or

(Testimony of Howard Baldwin.)

C. I. O. got into the plant, that it would be closed and moved back to Cleveland?

A. No, sir. [757]

Q. Anything in substance to that effect?

A. No, sir.

Q. I show you Board's Exhibit 9, which is a notice with respect to certain employees deemed to be supervisory. I will ask you if you are familiar with that notice? A. Yes, I am.

Q. Are you familiar with how it came about?

A. Yes.

Q. Will you state any conversation that you had with anyone connected with the company with respect to Board's Exhibit 9.

A. I spoke to Mr. Millman in respect to the men on this sheet, on Board's Exhibit 9, and there was some question in my mind, or rather there was some question in my mind and also some of the other boys in respect to these men.

This happened right after our September, final election. And we—I cannot tell exactly the conversation, but it was brought on by an interpretation of a Board's—it was an interpretation of the Board's order.

It was written up in a little book which we had in our possession, and it stated, I believe, in that book that it didn't make any difference whether a man could hire or fire, that if he was leading anybody, why, there was question of him being a supervisor.

(Testimony of Howard Baldwin.)

So, we brought this to the attention of management at the time. I believe Mr. Smith and myself were the chief [758] instigators of this, of our bringing it to the attention of management in respect to these men.

Q. Mr. Baldwin, did you ever seek to obtain any permission from the management to obtain members or collect dues on company time?

A. Would you repeat the question?

Q. Strike it, please. I will reframe it.

Did you ever obtain any permission from management, you or your union, to solicit members to the Alliance, or collect dues for the Alliance on company time? A. No, sir.

Q. Were you ever cautioned by anyone about any such activity on company time?

A. Yes, sir.

Q. On more than one occasion?

A. Yes, sir.

Q. Can you state about when this occurred?

A. Possibly the first time it happened may be last February, I would say.

Q. Who talked to you about it?

A. Well, Mr. Kearns talked to me about it.

Q. What did he say to you?

A. Well, Mr. Kearns cautioned me about our action and made reference to the fact he couldn't permit anybody else to do it, and we couldn't do it either. [759]

Q. Was that the substance of what he stated to you?

(Testimony of Howard Baldwin.)

A. That was the substance of what he stated.

Q. Did the Alliance ever obtain any permission from the company to hold company meetings on company time or property?

Mr. Moore: Objected to unless it is limited to time.

Trial Examiner Whittemore: No. I will permit the witness to answer.

The Witness: Would you read the question, please?

(The question was read.)

The Witness: No.

Q. (By Mr. Watkins) Any meetings of any of the committees of the Alliance?

A. You mean did we have permission to hold any meetings?

Q. Yes; any meetings of any character, did you have permission to hold.

A. No, none that I know of.

Q. Did you attend any meetings of any of the committees of the Alliance on company property?

A. Yes, I did.

Q. Were any of these meetings held on company time? Strike that, please.

Were any of these meetings held while the men were working?

A. Well, that, I couldn't state exactly, whether they were working. I know that on occasion one or two men of our committee would be working, say, a swing shift. We usually held [760] our meetings after work at 3:30, and at that time the

(Testimony of Howard Baldwin.)

committee member who was working would usually inform us that he was working and that he didn't have time. And most of the time if the business was just one or two items we might state to him what action we were taking, or what we were going to do, and we would tell him so that he would have knowledge of it, and he would usually leave us; and possibly sometimes only three of us would be left, maybe four. And the secretary did not always attend, because his position at that time didn't permit him to attend, because he was doing overtime work, and he was not always there to take minutes or notes of the meetings.

I think that is just about all.

Q. Yes. Where were such meetings held as you refer to?

A. Well, there was a little room on the, well, it wasn't exactly a room; it was just a little enclosure by some metal. It was really an arc welding room, and whoever was president at the time would say, "Well, I will meet you boys back there and talk for a few minutes."

Q. Was this room used for anything?

A. No, it wasn't very often.

Q. Could you be observed in that room by somebody else?

A. We couldn't have been observed, I don't believe, unless someone made a point to try to listen or try to swing the swinging door, although there was an opening at the bottom [761] but it went only as high as about six feet.

(Testimony of Howard Baldwin.)

Q. How many of such meetings would you say you attended?

A. In that particular spot, probably three.

Q. Mr. Baldwin, there has been some testimony here about meetings of membership of the Alliance on Sundays. A. Yes, sir.

Q. Can you state when the practice started, meeting of membership on Sundays, membership meetings?

A. When the practice of meeting on Sunday started?

Q. Yes.

A. I can't recall just when it did start. I mean, that was in practice when I joined the Alliance.

Q. I see. How frequently were those meetings held?

A. They were held once a month, but I think at that particular time, that is, I will say in 1940, around May of 1940, those meetings weren't held always once a month. It all depended upon the business that had to be taken up. Sometimes they would skip a month and it would be every two months they had a meeting.

Q. Do you know of any instances in which C. I. O. meetings were held at the same time for the workmen at Thompson's plant?

Mr. Moore: Objected to.

Trial Examiner Whittemore: Oh, I will permit the witness to answer, if he knows.

(Testimony of Howard Baldwin.)

The Witness: Yes, sir. [762]

Q. (By Mr. Watkins) Can you state about how many such meetings have been held say, during the past year or year and a half?

A. You mean the same as our meetings?

Q. Yes.

A. I think I can safely say three.

Q. Are meetings still held on Sunday? Membership meetings?

A. Yes, sir, they have been.

Q. During the period of these meetings that you mention, have the men been required to work on Sundays?

A. Well, there was no requirement for them to work on Sundays; they were asked to work on Sundays.

Q. Did you have a full shift on Sundays?

A. To the best of my knowledge, there wasn't a full shift on Sunday.

Q. What would you call it?

A. Oh, I don't think it was even a skeleton crew.

Mr. Watkins: That is all.

Redirect Examination

Q. (By Mr. Moore) You say you never asked for permission to solicit members on company time?

A. No, sir.

Q. Have you ever solicited members on company time?

A. What do you mean by soliciting? I mean, going up and——

(Testimony of Howard Baldwin.)

Q. Just state what you do when you see a new man come into [763] the plant and you think perhaps he might be interested in joining the Alliance?

A. Since I have been president out there the boys have approached him at lunchtime, or out in the lunchroom.

Q. What have you done?

A. I haven't been very active, so far as the solicitation of membership has been concerned. It has been primarily up to the committeemen.

Q. You do go over to a new man when you see him come in there and introduce yourself, don't you?

A. Not when I see him come in.

Q. I don't mean the moment he comes in, but——

A. Oh, you mean when I see a new man in the plant?

Q. Yes.

A. Well, I have went over and introduced myself to him, yes.

Q. About how many times has that happened?

A. Oh, I should judge maybe three or four or five times.

Q. What would you tell him on those occasions?

A. Outside of introducing myself and saying I was president of the PMPWA, and say, "How are you getting along," I wouldn't say any more.

Q. You didn't ask him to join, though?

A. No.

(Testimony of Howard Baldwin.)

Q. Did anyone caution you to stop that practice? A. Yes, sir. [764]

Q. Who was that? A. Mr. Kearns.

Q. Did you stop it? A. Yes, we did.

Q. That was about February of this year?

A. We were cautioned more than once.

Q. When was it you stopped?

A. Well, we stopped after each cautioning.

Q. And then began again?

A. That is right.

Q. How long would you stop after each cautioning?

A. Do you want me to be frank about it?

Q. Yes.

A. We stopped just as long as the other organization stopped when they were cautioned.

Q. About how long would that be?

A. About a week, maybe, or two, or maybe three, if it was exceptionally good.

Q. Was any disciplinary action ever taken against you for soliciting on company time, other than warnings which you have mentioned?

A. No, there was never any personal disciplinary action against me. That is, I mean they never took it that it was myself alone, but they always cautioned me, because I was considered as the leader of the organization, and it was up [765] to me to police my own organization and to warn my own fellows.

Q. Was any disciplinary action ever taken

(Testimony of Howard Baldwin.)

against any Alliance members for soliciting on company time?

A. Well, at the time I was in, that I don't know; I couldn't say.

Q. You testified you did not at any time ask permission to hold either membership meetings, or council meetings, on company property, did you not? A. We never requested that.

Q. Had the council——

A. Wait; I might say this: I haven't requested it since I have been president of the organization. If there was any request made prior to my being president, that I couldn't state, because I never was told that had been requested or not.

Q. All right. Even when you were not president, do you know whether or not the one you succeeded ever held a meeting on company property?

A. That I don't know. I don't know whether it even held meetings.

Q. You have never seen them hold a meeting on company property? A. Not myself, no.

Q. When you had a conversation with Mr. Millman about these men that you didn't want in the Alliance—— A. Yes.

Q. ——what did you say to him? [766]

A. Well, I will try and tell you the best I can. First of all, I would like to tell you how come it was brought up, and I think that will straighten it out.

Q. Go ahead.

(Testimony of Howard Baldwin.)

A. Mr. Smith and I had talked about it.

A. Mr. Elmer Smith; he and I talked about it

Q. You are speaking of Elmer Smith?

in a general way. We usually talked between ourselves, usually at lunch-time, and Mr. Smith showed me two books he had procured. I don't know just what they were. I think one was written by an attorney, and he pointed out different paragraphs in the book pertaining to what would be considered supervisors, and he said at the time, and I never verified it, that the Board had something in the Act, in reference to supervisors, that it would take in anybody who led in the work. Then I believe, I can't state for sure, but I think Mr. Smith said something to Mr. Millman in regard to that, and I also talked to him myself about it.

Q. To Mr. Millman? A. To Mr. Millman.

Q. I wish you would repeat that conversation, as nearly as you can.

A. Well, it was just a general——

Q. Who opened the conversation? I want to get what was said, if we can. [767]

A. Well, I had made a reference to the books to Mr. Millman. I told him what I had seen there in reference to these men, and I wondered about their position in the plant. I don't remember whether he stated to me at that time, whether it was he or Mr. Kearns, but they stated, so far as the management knew, that they hadn't considered them in a supervisory capacity; and I explained to them then from the book. I said, "Well, this in-

(Testimony of Howard Baldwin.)

terpretation of the Board's Act was that these men would be considered supervisors if they did any leading in the work."

Q. You told him that?

A. Yes, that was the substance of the statement I made to him. I think, I am not positive, but I think Mr. Millman said, "Well, I will have to speak to," whoever the superintendents were, I believe, at the time, "and ask them about what the capacity of the men was."

Q. Is that all you said there?

A. In respect to that matter, I believe it was.

Q. Didn't he ask you how the membership of the Alliance felt about it? A. No, sir.

Q. Did he understand you were speaking just for yourself?

A. Well, no. I believe he considered me as part of the Alliance; I was on the committee at the time.

Q. Had you discussed this construction of the National Labor [768] Relations Act with the membership?

A. I had only talked at a meeting, at one meeting, we talked about it. That is, prior to the time I talked to Mr. Millman, and prior to the time that, I believe, Mr. Smith talked to Mr. Millman, we had talked about it at a short meeting we held; the following meeting, I believe it was. I think Mr. Hess was present and Mr. Smith and myself and Frank Osborne, I believe were present at that time.

(Testimony of Howard Baldwin.)

Q. Why did you go to Mr. Millman with that problem?

A. It wasn't a problem that we took to him. After all, consider it this way: That these men, after all, if they were just considered as working men, I mean, working for a living, on an hourly paid rate, there would be no incentive for us to just say, "Well, they are supervisors, and let's throw them out." If you were still going to be covered under our contract, if the work wasn't entirely supervisory, they were entitled to some representation with management. If management considered them supervisors—in other words, take whatever constitutes supervisory work; why, then, it would be up to them to take care of the men the best way they could; and we didn't want them in the Alliance because we couldn't do any good anyway.

Q. Did you consider expelling them from the Alliance?

A. I don't know just how you mean by expelling them from the Alliance. We might have requested that they—— [769]

Q. My question is: Did you consider any action towards getting them out of the Alliance?

A. Not right at that time, no.

Q. Any action by the Alliance, I mean.

A. Not right at that time. We wanted to determine, first—we didn't want to kick out members unless they should actually be put out.

(Testimony of Howard Baldwin.)

Q. Did you leave it up to Mr. Millman to determine that they should be put out or kept in?

A. No, sir.

Q. Did you have a conversation with him after this conversation with him about the men?

A. I don't remember whether or not I had a conversation with him.

Q. Between the time you first approached him with the problem and the notice was posted, did you have a conversation with him?

A. No, I don't believe I did.

Q. So far as you know, you had the conversation with him, and the next thing that happened on that subject was the posting of the notice. Was that it?

A. To the best of my knowledge that was what happened. But Mr. Smith or Mr. Hess could have approached management with the same thing. [770]

Recross Examination

Q. (By Mr. Watkins) Mr. Baldwin, did you ever know of any C.I.O. workmen down in the plant who were disciplined for union activity?

A. No, sir, I don't know of any.

Q. Were you ever disciplined while you were president of the union for anything that you did in the plant? A. Yes, sir.

Q. When was that?

A. Well, that was about June 1st, I believe.

Q. Of what year? A. This year.

Q. What did you do?

(Testimony of Howard Baldwin.)

A. Well, I took a vacation and I got tied up and I got back a little bit late.

Q. What did the company do?

A. Well, they set me down for ten days.

Q. What do you mean by that?

A. Well, I was ready to go back to work but they weren't ready to take me back.

Q. Did they tell you that was because you had gone without permission? A. Yes, sir.

Q. You have enlisted, have you not, in the Air Corps? A. Yes, sir. [771]

Q. And you expect to leave the employ of the company shortly? A. Yes, sir.

Mr. Watkins: That is all.

Trial Examiner Whittemore: I have just one question: You testified your grandfather was a union man.

The Witness: Well, he was an organizer.

Q. (By Trial Examiner Whittemore) Did you ever consult your grandfather with respect to your activities here at this plant?

A. No, sir, I haven't.

Q. You have testified your father was a union member also? A. That's right.

Q. Did you ever consult with him with respect to your conduct as president of this organization?

A. Well, the last time I seen him I told him of being president of the Pacific Motor Parts Workers Alliance.

Q. Did you ask him what you should do in this matter?

(Testimony of Howard Baldwin.)

A. No, sir. He thinks I am old enough to know what to do.

Trial Examiner Whittemore: All right.

Q. (By Mr. Watkins) Mr. Baldwin, did any of the C.I.O. boys ever seek to take over the running of the Alliance? A. Yes, sir.

Q. About when was that?

A. About August of 1941. [772]

Q. And who, in particular, started the movement, would you say, among the C.I.O. boys?

Mr. Moore: I will object to that line of questioning.

Trial Examiner Whittemore: What is the point in this?

Mr. Watkins: There has been a great deal of mention, Mr. Examiner, of some internal conflict, and apparently there was some sniping at each other.

Trial Examiner Whittemore: I don't think it is at all material; there has been no showing the company had anything to do with it, so far as I know. There is nothing you have to combat.

Mr. Watkins: No further questions.

Trial Examiner Whittemore: I would like to give you, Mr. Baldwin, one chance to explain why it was you went to management to ask for advice on what the membership should be, when you didn't go to membership.

Mr. Watkins: I will object to the form of the question: You would like to give the witness one chance to answer certain questions. I think that

(Testimony of Howard Baldwin.)

is improper, in so far as the Examiner is concerned, and I object to it on that ground.

Trial Examiner Whittemore: That I said "one chance"?

Mr. Watkins: Yes.

Trial Examiner Whittemore: Substitute the word "a" and if you don't feel I am giving him a sufficient chance, I will give him another. He has testified he did go to Millman, and [773] he testified he did not go to the membership. Now, I am giving him a chance, or I will give him more chances than a chance, if you desire, to make an explanation. I don't have to do that, but I think you will agree that on the basis of his own testimony I can make certain findings, drawing certain inferences. To be absolutely fair, I am giving the witness an opportunity to explain. Now, go ahead.

The Witness: Mr. Examiner, I don't believe I stated I went to Mr. Millman for advice. I went and asked Mr. Millman what the management considered the capacity of these men. I wanted to know what they thought about it. That was all.

Trial Examiner Whittemore: All right. Did you take any action following the posting of the notice by Mr. Millman?

The Witness: Did we take any action? No, sir. The men, I believe, turned in their resignations to our organization voluntarily, and we didn't force them out, or take any action that was against those men.

Trial Examiner Whittemore: I have no further questions. [774]

WILLIAM J. KEARNS,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Watkins) Will you give your name to the reporter, Mr. Kearns?

A. W. J. Kearns.

Q. What is you present official capacity with Thompson Products, West Coast Division?

A. General superintendent.

Q. How long have you been employed by Thompson Products, or its predecessor, Jadson Motor Parts? A. About nine years altogether.

Q. What was the nature of your work in the early part of 1937?

A. In the early part of 1937 I was machine operator.

Q. Were you familiar at that time with the general shop setup, as to location of machines and things of that character? [775] A. Yes.

Q. Were you familiar with the location of the machine on which Mr. Louis Porter was working?

A. Yes.

Q. Did you know Mr. Porter? A. Yes.

Q. Did you know him intimately? A. No.

Q. Would you state, Mr. Kearns, what the situation is as to anyone attempting to talk to, say, Mr. Porter, while his machine was running? Could he talk in a normal tone of voice and be heard?

(Testimony of William J. Kearns.)

A. I think he would have to raise his voice a little.

Trial Examiner Whittemore: Wait a minute. Did you ever operate his machine?

Q. (By Mr. Watkins) Did you ever operate Mr. Porter's machine? A. No.

Q. You have stood alongside while it was operating, have you? A. Oh, yes.

Q. You are familiar with his machine?

A. Yes, sir.

Q. And have heard it operate on many occasions? A. Yes, sir.

Q. Will you answer my question, then, as to any conversation you could carry on with Mr. Porter while his machine was [776] operating? Would it have to be in a normal tone of voice or a loud voice?

A. You would have to raise your voice a little.

Q. How close to Mr. Porter's machine are the other machines? I am speaking now of the period in 1937. A. Oh, about 10 or 15 feet.

Q. Has there been any change in setup of machinery around Mr. Porter since 1937?

A. A little.

Q. All right. Going back, then, again to the period of 1937, the middle of that year, was his machine in a place where anyone approaching it could be observed by other employees?

A. Yes.

Q. By more than one?

(Testimony of William J. Kearns.)

A. Oh, I would say six or eight people.

Q. Is there a drinking fountain any place close to it? A. Yes.

Q. How close? A. Four or five feet.

Q. Have you ever given any instructions to any of your foremen with respect to organizing activities on company time? A. Yes, sir.

Q. On how many occasions would you say, during the past year and a half? [777]

A. On several occasions.

Q. Will you state the substance of what you said to them?

A. Well, I told them we didn't want to have anybody waste any time organizing anybody of any kind on company property.

Q. Have you ever talked to any employees in the plant about organizing on company time, other than supervisors? A. Yes.

Q. To whom? A. Elmer Smith.

Q. Anybody else? A. Howard Baldwin.

Q. On more than one occasion?

A. I have talked to Baldwin on probably two or three occasions, Smith on one occasion, is all.

Q. And what was the substance? Did you say substantially the same thing in the different conversations you have just referred to?

A. Yes, sir.

Q In substance, what was it?

A. I told them I didn't want any organization of any kind organizing, organization of any kind on company time.

(Testimony of William J. Kearns.)

Q. Did you ever give any permission to the Alliance or to any of its committee members to hold committee meetings in the plant?

A. No. [778]

Q. Did you ever give any permission to any of the committee members of the Alliance or to anyone connected with the Alliance to have any committee meetings on company time? A. No.

Q. Were meetings of this character by the Alliance's committee on company property or company time ever called to your attention? A. Yes.

Q. Will you state approximately when?

A. I think it was about a year ago.

Q. Mr. Kearns, I show you Respondent's Exhibit 6 and will ask you to examine it and then state what you know about the background of that notice.

A. This is the labor relations meeting. Is that what you mean?

Q. Have you examined the notice yet?

A. Yes.

Q. Do you know to what it refers?

A. Yes.

Q. Do you know of any discussion between you and Mr. Millman or anyone else at Thompson Products, about the matter covered by Respondent's Exhibit 6?

A. I believe we talked about it. I don't remember.

Q. You don't remember anything specific about it? A. No. [779]

Q. Mr. Kearns, during the past couple of years,

(Testimony of William J. Kearns.)

what has been your situation at the plant with respect to Sunday work?

A. We have worked some Sundays in the past year, skeleton crews, more or less.

Q. What about the men? Are the men required to work on Sundays?

A. We ask them to work, and if they refuse to work we ask the next man.

Q. Have you had any occasion during the past, we will say year and a half or two years, when any request was made to you by the men to be off duty to attend a union meeting? A. Yes.

Q. Can you state approximately when that request was made?

A. I will say that's about a year ago.

Q. Oh, and can you state who made the request?

A. Mr. Baldwin.

Q. What did he say to you?

A. He asked us if the men could take time off to go to their meetings, and we granted it.

Q. Yes. Did the men make up the time, subsequently? A. Yes, sir.

Q. Did you make that arrangement with Mr. Baldwin at the time? A. Yes.

Q. Did you have any swing shift on these Sunday operations? [780] A. At that time, no.

Q. In other words, they could make up time without interfering with any other shift?

A. With anybody, yes.

Q. Have there been any other instances during this period of time where the men have wanted off

(Testimony of William J. Kearns.)

for other reasons and you have let them off and let them make up the time?

A. You mean on Sunday work?

Q. Yes, on Sunday work.

Mr. Moore: I will object to that, due to the fact his testimony is that they didn't have to work unless they wanted to, to begin with.

Mr. Watkins: My only point, Mr. Examiner, was to show that as a matter of fact they didn't have to work, and the men, for various and sundry reasons, were permitted to meet on Sunday.

Trial Examiner Whittemore: He has testified to that now.

Mr. Watkins: All right. Did the Examiner rule on the question?

Trial Examiner Whittemore: I will sustain the objection. I think Mr. Moore's point is well taken.

Q. (By Mr. Watkins) You know Mr. Charles Little, an employee in the plant? A. Yes, sir.

Q. Are you familiar with his duties? [781]

A. Yes, sir.

Q. Do you consider him a supervisor?

A. No, sir.

Q. Does he have any men under him?

A. No, sir.

Q. Does he have any power to hire and fire?

A. No, sir.

Q. I believe there has been some testimony as to Mr. Little leaving instructions, or something of that character, to subsequent shift men. Will you state what the situation is with respect to that?

(Testimony of William J. Kearns.)

A. If he is working on any tool and doesn't get it finished at quitting time, he instructs the following tool sharpener man to finish the work, and this man will instruct the following man to do the same; and he will also break in a green man to do his type of work; but he didn't supervise the department. He just broke in the men on the job.

Q. I see. In other words, anyone doing the work on that shift would give the succeeding man instructions with regard to the work in process at the time the shift was over. Is that correct?

A. That is correct.

Q. I would like to direct your attention to a meeting at the Thompson Products plant, at which some representative of War Production Board was present, also Mr. Hileman, I [782] believe, and others. Does that refresh your recollection as to an incident? A. Yes, sir.

Q. Will you state approximately when that took place?

A. I would say about three months ago.

Q. Who was present at that meeting?

A. Mr. Hileman, Mr. Millman, and Mr. Smith and Mr. Spencer, and the gentleman from the War Production Board. I have forgotten his name.

Q. Were you there during the entire meeting?

A. Yes.

Q. Can you state the reaction you had to Mr. Hileman at this meeting, to his attitude?

Mr. Moore: I will object to that.

(Testimony of William J. Kearns.)

Trial Examiner Whittemore: I will sustain the objection.

Q. (By Mr. Watkins) Did Mr. Hileman say or do anything in this meeting which indicated his frame of mind with respect to the incident?

A. He made a statement he would throw anyone out if he caught them organizing on company time.

Q. To whom did he make that statement?

A. To Elmer Smith.

Mr. Moore: Just a minute. May I have the last two questions and answers read?

(The record was read.) [783]

Mr. Moore: No objection.

Q. (By Mr. Watkins) Have you, in your contact with Mr. Hileman, ever heard Mr. Hileman make a similar statement to anyone else?

A. I don't recall.

Q. Have you ever, in your contact with Mr. Hileman, noticed him as in the same frame of mind he was during this meeting? A. No.

Q. How would you describe his frame of mind at this time?

Mr. Moore: I will object to that.

Trial Examiner Whittemore: I will sustain the objection.

Q. (By Mr. Watkins) During this meeting did Mr. Smith—is that Elmer Smith?

A. Elmer Smith, yes, sir.

Q. Did he make any statement with respect to his feeling about the Thompson Products plant, as a place to work?

(Testimony of William J. Kearns.)

A. Yes. He said it was the best place he had ever worked at.

Q. Was Mr. Spencer also present?

A. Yes, sir.

Q. Did he also make any such comment?

A. He made the same statement.

Mr. Watkins: That is all.

Cross Examination

By Mr. Moore:

Q. Mr. Kearns, what type of machine was Mr. Porter operating in 1937? [784]

A. Straightening machine.

Q. A forge straightener?

A. Yes, sir.

Q. What type of machines were around his machine, close to it?

A. Well, there was a slotting machine and some hand straightening machines, and not far away, some drop hammers and a screw press.

Q. Did those machine make quite a bit of noise?

A. Considerable noise.

Q. You said that on two or three occasions you talked to Mr. Elmer Smith about organizing on company time?

A. I don't believe I said on two or three.

Q. Well, what was your testimony?

A. One occasion I spoke to him.

Q. On one occasion with Mr. Smith?

A. I spoke to him.

Q. And how many with Mr. Baldwin?

A. I think two or three occasions.

(Testimony of William J. Kearns.)

Q. Can you fix the approximate date when you first spoke to Mr. Baldwin?

A. I don't remember.

Q. How long after he was elected president of the Alliance was it?

A. A short time after. [785]

Q. Can you fix the first occasion on which you talked to Mr. Elmer Smith?

A. About three or four months ago.

Q. Was that while Mr. Smith was a member of the C. I. O.?

A. I don't know as he is a member.

Q. Three or four months ago. Can you say about what month that would be?

A. About what month it would be in?

Q. Yes.

A. Oh, possibly June or July, along in there.

Q. Do you know about when Mr. Smith left the employ of the company? A. Yes.

Q. About when was that?

A. Oh, about 30 days.

Q. Ago? A. Yes.

Q. How long before that was your first contact with him with respect to organizing on company time?

A. Probably two or three months.

Q. Do you recall any meeting of the executive council of the Alliance that occurred on company property other than the one you testified to that happened about a year ago? A. No.

Q. You mean that never since August of 1937

(Testimony of William J. Kearns.)

have you [786] observed that council in a meeting on company property?

A. I didn't understand your question.

Q. Have you since August, 1937 observed the executive council of the Alliance in meetings on company property? A. Yes.

Q. About how many times?

A. I don't recall.

Q. Several? A. Several times.

Q. Was the occasion about a year ago the first one on which you ever called that to Mr. Millman's attention? A. Called what to his attention?

Q. Council meetings on company property?

A. Yes, I think it was about a year.

Q. Now, with respect to working on Sundays, you testified a man could get off for any reason. Is that true? A. Yes.

Q. When you said that were you testifying about a man who had begun to work on Sunday, or a man who was asked to work on Sunday?

A. About a man who was asked to work on Sunday.

Q. If a man started a shift on Sundays you would expect him to work through the day, wouldn't you? A. That's right.

Q. On days when the Alliance held meetings, at what time [787] would the shift begin?

A. Well, we started sometimes at 6:00 and sometimes at 7:00.

Q. And what time would the shift end?

A. I think about 10:00 o'clock.

(Testimony of William J. Kearns.)

Q. P. M.? A. Yes, sir.

Q What is your testimony?

Mr. Watkins: You want the question and answer read?

Mr. Moore: Yes, may I have it read?

(The record was read.)

The Witness: I meant before, they went to the meeting and then they came back.

Q. (By Mr. Moore) I see. Came back at what time? Then your answer will be 10 A. M.

A. I mean 10 A. M.

Q. At what time would the men come back and start working again?

A. Right shortly after lunch.

Q. And they worked until what time?

A. They would make up their time, eight hours.

Q. They would work so that they worked eight hours on Sunday? A. Yes.

Q. When you said that they were permitted to make up the time they lost by going to these meetings, you mean they were [788] permitted to do it that day? A. Yes.

Q. And not some other day?

A. Not any other day.

Q. On Sundays when no meetings were scheduled, what would be the normal time for the shift?

A. 7:00 to 3:30.

Q. 7:00 to 3:30? A. Yes, sir.

Q. When you planned to start the shift at 6:00 a. m. rather than 7:00, how was that brought to the attention of the employees?

(Testimony of William J. Kearns.)

A. The foremen told them the time to come to work.

Q. Did you instruct the foremen to tell them?

A. Yes.

Q. What did you instruct the foremen to tell the employees? A. What time to start.

Q. Did you tell him to say why?

A. They was aware of the fact that there was going to be a meeting that day.

Q. Did the plant close down from 10:00 to 12:00 on Sundays when meetings were held?

A. Yes.

Q. There was not a skeleton force working during the period from 10:00 to 12:00? [789]

A. No one working.

Q. Did you ever close the plant down so that the men might attend a C. I. O. meeting?

A. I don't know. How do you mean that?

Q. Did anyone ever request you to do that?

A. No.

Q. To your knowledge was the plant ever closed down for that purpose? A. No. [790]

CLARENCE MILLMAN,

recalled as a witness by and on behalf of the respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination
(Continued)

By Mr. Watkins:

Q. Mr. Millman, referring to an incident at which representatives of the War Production Board were present, will you state approximately when this took place?

A. I think it would have been in probably June of this year.

Q. You heard Mr. Kearns testify, did you, with respect to that, as to who was present?

A. That is correct.

Q. Would your testimony be the same as to who was present at the meeting?

A. It would.

Q. Will you state what conversation at that meeting took [791] place between Mr. Hileman and Mr. Elmer Smith or Mr. Roy Spencer? Is that his name? A. Clyde Spencer.

Mr. Hileman asked Elmer why he hadn't come to Mr. Kearns, to me, or to himself before running to the War Production Board with this list of machinery which was supposed to be standing idle. Elmer didn't have much of an answer for that at all.

Q. Did Mr. Smith say anything in reply to that?

(Testimony of Clarence Millman.)

A. Well, I don't recall him having any definite answer. He, oh, rather mumbled about it.

Q. What was the next thing said?

A. Somehow or other the discussion of union activities came up.

Q. Do you know how it came up?

A. No, I don't know how it came up.

Q. Tell us what was said about that.

A. Well, Mr. Hileman told Elmer and Clyde both that he would throw them out bodily if he caught them organizing on company time and, that goes for anybody else.

Q. That was the statement you heard made by Mr. Hileman? A. That is right.

Q. Did either Mr. Smith or Mr. Spencer make any statement about their attitude towards Thompson Products? A. Yes, they did. [792]

Q. What did they say? Tell us who stated it and what it was.

A. Well, Elmer first said that it was the finest place he ever worked.

Q. When you say "Elmer" you mean Elmer Smith?

A. Elmer Smith. Mr. Hileman then asked Clyde Spencer what he thought of the place, and he said he agreed with Elmer, that that was the best place he had ever worked.

Q. Did this conversation occur before or after the conversation about the War Production Board?

A. No, I believe that came out after the con-

(Testimony of Clarence Millman.)

versation concerning the War Production Board had finished.

Q. Directing your attention, Mr. Millman, to an investigation at your plant—— A. Yes.

Q. Do you remember an investigation comparatively recently? A. Yes.

Q. Do you know about how long ago it was?

A. Yes, it was in the latter part of July.

Q. Of—— A. 1942.

Q. Yes. Will you state what was the first thing you knew about it?

Mr. Moore: I will object to the question on the ground it is immaterial.

Trial Examiner Whittemore: What is the purpose? [793]

Mr. Watkins: Mr. Examiner, the purpose of it is primarily, impeachment of Mr. Louis A. Porter, because this whole incident involves the conduct of Mr. Porter down there and some stories told by him that turn out to be wholly untrue, and involved Mr. Porter with the Federal Bureau of Investigation, causing him to resign.

Mr. Moore: May I speak on that?

Trial Examiner Whittemore: Yes; surely.

Mr. Moore: I do not believe that that is the proper method of impeaching a witness, to begin with. Mr. Watkins did not say that he was going to prove that Mr. Porter has ever been convicted of a crime, or he was ever charged with a crime. There was an investigation and Mr. Porter was questioned, I assume. However, I don't believe that

(Testimony of Clarence Millman.)

specific acts, or, even if he proved he told untruths in the past, I don't believe that is the proper subject for impeachment.

Mr. Watkins: I think, Mr. Examiner, it goes very definitely to credibility of the witness with respect to some of the things that have been stated here, and I think this incident with the investigation is of considerable importance, considering Mr. Porter's testimony.

Trial Examiner Whittemore: Will you bring in any F.B.I. records?

Mr. Watkins: No.

Trial Examiner Whittemore: You have no intention of [794] doing that. You have intention only of asking some member of management what his recollection is about something Mr. Porter may have said to the F.B.I.?

Mr. Watkins: Mr. Examiner, this was an incident that caused considerable concern down at the company, because the company was the one accused by Mr. Porter of doing certain things to the machinery. This isn't some flimsy incident the company hasn't some positive recollection on. It didn't happen five years ago.

Trial Examiner Whittemore: What has this got to do with what happened five years ago?

Mr. Watkins: Mr. Porter testified to a great many things management was supposed to have done, things which discredit company and management and the officials. What I am trying to show by this evidence is Mr. Porter's reliability and

(Testimony of Clarence Millman.)

credibility, because again we have, if we are permitted—I won't go into it; but as I say, we have a similar situation where the answer was a little easier to arrive at because it happened recently, than are the situations where we have incidents five years old.

Trial Examiner Whittemore: Is this going to be very brief?

Mr. Watkins: Yes. I think it probably will take 15 minutes in that connection.

Trial Examiner Whittemore: I frankly do not think it is [795] important. The thing I am interested in is the issue in this case. If you are going to be very brief, go ahead.

Mr. Watkins: All right.

The Witness: Will you read the question, please?

(The question was read.)

The Witness: Mr. Hileman called me up to his office. When I got in there he introduced me to Mr. Matthews of the Federal Bureau of Investigation, who told us that Mr. Porter on about a week previous had come to the F. B. I. office with a small bottle of oil which was about 90 per cent emery dust, and Mr. Porter had said he had found the emery dust in one of the oil cups on his machine.

Mr. Matthews then asked to inspect Mr. Porter's machine, which he did. He asked for samples of that emery dust which we might have in the plant,

(Testimony of Clarence Millman.)

which was obtained from the tool crib. This emery dust was taken to our laboratory in the plant and checked with the emery dust which was found in the bottle.

Mr. Matthews, he left shortly after lunch, then——

Q. Just a moment, please.

Mr. Examiner, I am letting the witness go ahead because I think, perhaps, that is the briefest way to get at it.

Trial Examiner Whittemore: Cover it very briefly, please.

The Witness: Yes, sir. He left shortly after lunch and he returned, I believe the next day, although I personally never saw him until the day Mr. Porter left. [796]

On that morning, early in the morning, I happened to pass Mr. Porter's machine, and he called me over and asked me could I have his pay check made up by noon. I said I believed it could be, but I would like to know why. He said, "Well, there were too many things" against him, and he would like to leave. I told him he had some seven years seniority and he should take that into consideration. He said he had considered everything and still wanted to go.

I said, "All right. I will start the machinery to have the check made up. If you change your mind, let me know."

I went back to my office and Mr. Hileman was then calling me to tell me Mr. Matthews was in his

(Testimony of Clarence Millman.)

office. I went to Mr. Hileman's office and Mr. Matthews asked if it was possible to talk to Mr. Porter alone. I arranged the meeting between Matthews and Porter in my office. I was in the ante-room outside my office, and after about ten minutes conversation between Mr. Porter and Mr. Matthews, and Mr. Porter came out and asked if his check was ready. I said it would take about ten minutes, and he said he wouldn't wait, and he handed me his badge, identification card, and tool checks and left immediately.

Mr. Matthews went out the inner door of my office into the plant, and that is the last I saw of him. Mr. Matthews later reported back to Mr. Hileman——

Trial Examiner Whittemore: Wait a minute. Tell me what [797] he reported to you.

The Witness: I never saw Mr. Matthews again.

Trial Examiner Whittemore: All right.

Q. (By Mr. Watkins): Mr. Millman, did you hear Mr. Porter testify that he had never been a member of the Kansas City police force?

A. I did.

Q. Did he ever tell you he was a member of the Kansas City police force? A. Yes, he did.

Mr. Moore: Objected to.

Trial Examiner Whittemore: I will permit the witness to answer that.

The Witness: Yes, he did. He showed me letters of recommendation which he had from the police force of Kansas City.

(Testimony of Clarence Millman.)

Q. (By Mr. Watkins): When was that?

A. About two weeks after he left our employ, possibly the middle of August.

Q. Have you checked to find out from Kansas City whether or not he did work on that force?

A. Yes.

Q. What did you find out?

A. I find he did.

Mr. Watkins: That is all.

Cross Examination [798]

Q. (By Mr. Moore): Mr. Millman, did you ever apologize to Mr. Smith or Mr. Spencer for the way Mr. Hileman acted at that meeting?

A. No.

Q. You never said a word about it?

A. It was discussed. Mr. Smith discussed it with me.

Q. When was that?

A. He said he thought Mr. Hileman had gotten a little rough in talking to him, and I said, "Well, Mr. Hileman was pretty mad at that time."

Q. Is that all that was said?

A. That is all.

Q. Are you sure Mr. Matthews said Mr. Porter had come down to his office?

A. Absolutely. He said Mr. Porter had gone to his office July 22nd, with this bottle of oil, and he also had a small box which presumably contained emery dust which had been in his machine.

Q. Do you know whether or not Mr. Porter did go to his office?

(Testimony of Clarence Millman.)

A. No, I don't. I only know what Mr. Matthew told us, and I had no reason to doubt him.

Mr. Moore: That is all. [799]

PAUL D. HILEMAN

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Watkins:

Q. Will you give your full name to the reporter, please, Mr. Hileman?

A. Paul D. Hileman.

Q. Will you state your official capacity with Thompson Products, Inc.?

A. I am plant manager of the West Coast plant.

Q. And how long have you been in that capacity with Thompson Products, or its predecessor, Jadson? A. About five years.

Q. Do you recall when you first came to Los Angeles to take charge of the West Coast Division?

A. Yes, sir, I do. [801]

Q. When?

A. It was in July of 1937.

Q. Can you fix any more specifically what part of July? A. I got here the 30th of July.

Q. What work had you done, what occupation had you been engaged in prior to the time you came out here to take charge of the Jadson division?

(Testimony of Paul D. Hileman.)

A. I was an engineer for the company in Detroit, having to do with valve and valve train design, and design of our parts.

Q. A mechanical engineer?

A. That is right.

Q. Prior to this time had you had any experience with operating any plant or any portion of it? A. No, sir.

Q. Will you state, Mr. Hileman, whether or not you had any conversation with Mr. Ray Livingstone shortly after your arrival here at the end of July, 1937? A. Yes, I did.

Q. Will you state, as nearly as you can recall, when you first conversation with him took place?

A. It was on the morning of the 30th of July when I got here and looked him up.

Q. Will you state what the conversation was at that time?

A. Yes. He had been here for some time prior to my arrival and had—was working on the wage incentive plan, and he also [802] told me what the conditions were in the plant.

Q. State what he told you.

Mr. Moore: Just a moment.

Mr. Watkins: Is that what you were after?

Mr. Moore: I will withdraw the objection until he answers.

Q. (By Mr. Watkins): State what he told you as to the conditions in the plant, Mr. Hileman.

A. He told me the conditions were pretty bad.

(Testimony of Paul D. Hileman.)

Q. Will you state, as nearly as you can recall, what conversation there was and what he related to you?

A. He told me the wage rates were out of balance, some were too low and that others were too high in comparison with other jobs.

Q. Was there anything else that you can recall you discussed then? Did you have more than one meeting with him during this period?

A. Many meetings, I think every night we had dinner together and discussed additional things having to do with the operation of the plant.

Q. Can you state whether or not during any of these meetings Mr. Livingstone mentioned Mr. Lewis Porter to you? A. He did not.

Q. Can you state whether or not during any of these meetings Mr. Livingstone mentioned Mr. Victor Kangas to you?

A. Yes, he talked to—— [803]

Q. Just a moment. You can state that he did?

A. Yes.

Q. Can you fix the approximate time when the conversation about Mr. Kangas took place?

A. The week following my arrival.

Q. Do you know where it took place?

A. I believe it was in my office.

Q. Do you remember who was present at the meeting? A. Just Mr. Livingstone.

Q. Will you state what was said to you about Mr. Kangas by Mr. Livingstone?

A. Mr. Livingstone said that Vic Kangas was

(Testimony of Paul D. Hileman.)

what he considered a shop foreman. He said we had no one at that time to take charge of the shop, that is, the actual manufacturing, and he suggested that Vic might be a good man.

Q. In other words, to take charge of the entire manufacturing? A. That is right.

Q. Did he make any other comments, so far as you can recall, about Mr. Kangas at that time?

A. No, sir.

Q. Did he say anything about Mr. Kangas' relationships with Mr. Dachtler?

A. Yes, he did.

Q. Do you remember what he said?

A. He told me that there was a lot of friction between [804] Dachtler and Kangas and that, I believe he said Mr. Dachtler wanted to discharge Kangas at that time.

Q. Mr. Hileman, have you ever, since you have been at Thompson Products, or Jadson, its predecessor, made any statement either to the foreman or any of the employees or to anyone else to the effect you would close the plant if the C. I. O. or A. F. of L. moved in?

A. No, sir, I never did.

Q. Anything to that effect, or in substance?

A. No, sir.

Q. Mr. Hileman, I will show you Board's Exhibit 7, and I will ask you if you have ever seen that document before? A. Yes, sir.

Q. Did you write Board's Exhibit 7 and send it to Mr. Kangas? A. Yes, sir.

(Testimony of Paul D. Hileman.)

Q. And on or about the date it bears?

A. Yes, sir.

Trial Examiner Whittemore: May I see that?

Mr. Watkins: Yes.

Q. (By Mr. Watkins): Will you state how you happened to—strike that, please.

Was that Board's Exhibit 7 sent with anything else? A. Yes, sir.

Q. With what? A. A box of cigars. [805]

Q. Will you state how you happened to send Mr. Kangas at that time a box of cigars, and to write Board's Exhibit 7?

Mr. Moore: I will object to the question. I think the exhibit speaks for itself. The reason is stated there.

Trial Examiner Whittemore: This does state it. Was there something else beyond what it says there?

Mr. Watkins: Well, I am trying to find out what the situation was. This was introduced by Mr. Kangas, and it was only identified by him as having been received.

Trial Examiner Whittemore: All right. You may answer.

The Witness: Well, Mr. Kangas had been with the company a long time, I think about 17 years or more, and when he left the company I believe he was pretty well broken up over it. Also, about that time or shortly after, there were a number of very vicious rumors going around the shop——

Mr. Moore: Just a moment. I will move the testimony about the vicious rumors be stricken, be-

(Testimony of Paul D. Hileman.)

cause it cannot possibly have any connection with the exhibit.

Trial Examiner Whittemore: You mean after you sent this?

The Witness: Prior to the time I sent that.

Mr. Watkins: The witness is stating his reason for sending it.

Trial Examiner Whittemore: All right. I will overrule the objection.

The Witness: So I called the—or I asked my secretary [806] to procure the cigars and send them to him putting that note in. I did so in the hope that it might soften the blow on Vic, and frankly, it was a bit of a selfish motive involved also.

I hoped that by so doing I would help to put a stop to some of the rumors which were being circulated in the plant.

Q. (By Mr. Watkins): Mr. Hileman, did you ever make a payment of $50.00 to Mr. Lewis Porter, or give Mr. Victor Kangas $50.00 to give to Mr. Lewis Porter? A. No, sir.

Q. Did you ever make any payment of any kind to Mr. Lewis Porter other than his regular wages?

A. No, sir.

Q. Did you ever have Mr. Kangas or anyone else make any payment other than regular wages to Mr. Porter? A. Yes, sir.

Q. Can you state approximately when some payment of that character was made to Mr. Porter?

A. It was about June of 1938.

(Testimony of Paul D. Hileman.)

Q. Will you state what had been done by Mr. Porter which called for your making him such a payment?

A. Mr. Porter had done certain investigative work for us. We had been told that valves, aircraft engine valves, were being stolen from our shop, and peddled around airfields, and in certain machine shops. Porter's job was to investigate [807] those statements and if possible, track down the source of the valves, and find out who in our plant, if anyone, was stealing them.

Q. At whose suggestion was Mr. Porter designated to do this job?

A. At Vic Kangas' suggestion.

Q. All right. Go ahead. Were you finished with your statement? A. Yes, I am.

Q. Did you make a payment of money to Mr. Porter in connection with this work you have just related? A. I didn't do it.

Q. What did you do with respect to it?

A. I secured $40.00 and turned it over to Vic Kangas and he in turn gave it to Mr. Porter.

Q. Was it given to him in cash?

A. Yes, sir.

Q. Why didn't you give it to him by check?

A. Well, because at that time the company was small. We didn't want extra checks issued which would immediately be known by a number of people, and the purpose of Mr. Porter's work would be defeated.

(Testimony of Paul D. Hileman.)

Q. Did you have any discussion with anyone in the company prior to giving the cash to Mr. Kangas for Mr. Porter? A. Yes, sir. [808]

Q. With whom?

A. Mr. William Metzger.

Q. Who was he at that time?

A. He was our controller.

Q. Did you have any discussion with anyone before you arrived at the amount of money you were giving to Mr. Porter? A. Yes, sir.

Q. With whom? A. Mr. Kangas.

Q. Will you state what your discussion with Mr. Kangas was?

A. Vic and I were discussing the amount of remuneration which we felt Porter should get——

Mr. Moore: I will move that portion of the answer be stricken.

Q. (By Mr. Watkins) Mr. Hileman, will you place about the time this discussion took place?

A. I believe it was June of 1938.

Q. Where did it take place?

A. In my office.

Q. Who was present?

A. Just Vic Kangas and myself.

Q. Will you state what was said by each of you, as nearly as you can recall, at that meeting?

A. Well, we discussed what Porter should get for his work, and we finally arrived at a figure. [809]

Q. How did you arrive at that figure? Did you discuss the basis for that figure?

(Testimony of Paul D. Hileman.)

A. Yes, sir, we did.

Q. What was your discussion with respect to the basis of that figure?

A. If I recall correctly, Porter had taken approximately a week off to do this investigative work, and we estimated the amount of money he would have normally earned on his position, and to that we added an allowance for gasoline mileage, and I believe lunches, and things of that nature.

Q. Did Mr. Kangas give you the figure as to the amount of time having been taken off by Mr. Porter for the work? A. Yes, he did.

Q. I will show you respondent's Exhibit 4, and will ask you what that is.

A. Well, that's an expense sheet. It covers the $40.00, which I turned over to Vic Kangas, and which he, in turn, was to give to Lou Porter.

Q. Did you give any sum of money other than this to Mr. Lewis Porter? A. No, sir.

Q. Or did you have anybody else do it?

A. No, sir.

Q. Mr. Hileman, do you remember a conversation which you had with Mr. Overlander, oh, within the past six or eight months? [810]

A. Yes, sir.

Q. What is Mr. Overlander's first name, do you know?

A. I believe his first name is George.

Q. He was an employee at your plant?

A. He was.

(Testimony of Paul D. Hileman.)

Q. Can you state where this conversation took place? A. Yes, sir.

Q. Where? A. In my office.

Q. Who was present?

A. Just George Overlander and myself.

Q. Will you please state the conversation there, who started it and what took place, as nearly as you can recall.

A. George Overlander came in and said he had an important matter he wanted to discuss with me. So he started off by saying Irvin Hess had resigned the presidency of the PMPWA, and who would I think would make a good successor.

Q. What did you say to that?

A. I told him that that was purely a PMPWA problem, that I couldn't advise him, and that they would have to solve their own difficulties.

Q. What did he say? Did he say anything further about it at that time?

A. Yes, sir, he did.

Q. What further did he say? [811]

A. He brought up the name of Frank Osborne and Howard Baldwin, and he asked me if I thought either of those two men would make a good leader or president for the Alliance.

Q. Did he ask you again at this time to give an opinion on the question?

A. Yes, sir.

Mr. Moore: I will object to that.

Trial Examiner Whittemore: I will permit the answer.

(Testimony of Paul D. Hileman.)

Q. (By Mr. Watkins) Go ahead.

A. Yes, sir. He did, and I again refused any advice along that line.

Q. What else was said in that conversation?

A. Well, we weren't getting any place, and I had been rather busy, so, to get Overlander out of the office, I said, "George, give me several days to think it over." He thereupon left.

Q. Did you ever contact Mr. Overlander again about this matter? A. I never did.

Q. Did you ever contact anybody in connection with the Alliance about the matter?

A. No.

Q. Or ask anyone else to get any information with respect to the Alliance or any of its members?

A. No, sir.

Q. Have you during the past six months disciplined any [812] official of the Alliance?

A. Yes, sir.

Q. Who? A. Howard Baldwin.

Q. When did this take place?

A. I think it was in June of this year.

Q. Why was he disciplined?

A. Well, he went on a vacation which was unauthorized. He remained away longer than he should have.

Q. How did you discipline him? What did you do?

A. When he came back for work I told Kearns and Millman both that he was to be sent home

(Testimony of Paul D. Hileman.)

and told that when we wanted him back we would call him.

Q. How long was he sent home?

A. I believe ten days.

Q. I believe you have heard the testimony of Mr. Kearns and perhaps Mr. Millman about the War Production Board incident in your office.

A. Yes, sir.

Q. If you were asked questions about that meeting would your testimony be substantially the same as they have given?

A. Exactly the same.

Q. Do you wish to state just what conversation took place between you and Mr. Elmer Smith and Mr. Clyde Spencer with respect to union activity? [813]

A. It already has been stated by both Kearns and Millman, but I will say this: That I told Smith and Spencer both that if I caught them organizing on company time, they or any other union, I would throw them off the property.

Q. Were those the words you used?

A. No, not the exact words.

Q. Did you use, perhaps, stronger language than that? A. Yes, sir.

Q. Referring to Mr. Victor Kangas, did you ever have occasion to reprimand or caution Mr. Kangas prior to the time he left the employment of the company?

A. A number of times.

Q. Can you state when this first occurred?

(Testimony of Paul D. Hileman.)

A. It probably first occurred about a year and a half before he was discharged. That would have been the spring of 1939, I would believe, or 1938, possibly '38. I am not real sure, but it was sometime before he finally left our employ.

Q. Do you remember what the particular incident was?

A. Yes. I was very much dissatisfied with the production that we were getting out of the plant.

Q. Did you have a discussion with Mr. Kangas concerning it? A. Yes, sir.

Q. Where did that take place?

A. In my office.

Q. Who was present? [814]

A. Just myself and Mr. Kangas.

Q. What was said?

A. I told him we would have to do better, production-wise; that there were a number of our customers who were not satisfied, and that I felt for the amount of man hours we were putting in the production was not sufficient.

Q. Then, did you have any occasion following that to have any discussion with him about his work there at the plant?

A. Yes, on a number of occasions.

Q. Can you state another occasion and fix the approximate date for it?

A. One occasion stands out in my memory, that was that Vic had——

Q. Just a minute. Can you first approximate the date for it, Mr. Hileman?

(Testimony of Paul D. Hileman.)

A. Yes, it was in the spring of 1940.

Q. The spring of 1940. Was this a conversation you had with Mr. Kangas? A. Yes.

Q. Where did it take place?

A. In my office.

Q. Just you and Mr. Kangas were present?

A. That is right.

Q. All right. What was said?

A. I discovered that he had on his own authority got one [815] of our customers to approve some material.

Q. Did you tell him this?

A. Yes, which was not up to full standard, and that he had, in so doing, neglected to notify our sales and engineering departments, which was a very serious breach of company regulations, and organization. I believe at that time I followed it up with a strong letter so that his memory would be very clear on the thing.

Q. You didn't threaten to discharge him or anything of that kind at this time?

A. No, sir.

Q. In other words, you and Mr. Kangas were on friendly terms? A. That is right.

Q. When was the next occasion you can recall when you talked to Mr. Victor Kangas about his work?

A. I can't recall any specific instance, but there were numerous instances in which I complained about the dirt in the shop, and various things.

(Testimony of Paul D. Hileman.)

Q. Were any instances about his conduct in the plant? A. Yes, sir.

Q. All right. Will you fix a time, if you can, for an incident of that character?

A. Well, that was about February or March of 1940.

Q. Will you state what happened at that time?

A. Well, Vic—I talked to Vic, you might say like a father; [816] he was having trouble at home; it was affecting his wife—or his work——

Mr. Moore: I will object to that, and ask that it be stricken.

Trial Examiner Whittemore: Just where does this lead, anyway?

Mr. Watkins: You mean this conversation about his affairs?

Trial Examiner Whittemore: Yes. I don't see the slightest materiality.

Mr. Watkins: The materiality will come up later.

Trial Examiner Whittemore: How much later? I am very patient.

Mr. Watkins: That is a relative term.

Trial Examiner Whittemore: What do you mean, patient?

Mr. Watkins: Yes.

Trial Examiner Whittemore: Oh, later?

Mr. Watkins: What I was going to say is: I think this shows the background of the relationship between Mr. Kangas and Mr. Hileman, the reason for letting him go, and perhaps the rea-

(Testimony of Paul D. Hileman.)

son for some of the things that subsequently developed. However, Mr. Examiner, I will highlight it, if I can.

Trial Examiner Whittemore: If you can, I would appreciate it, because I don't see, as yet, anything which in any way attacks Kangas' credibility, and that seems to be the only point you have to meet here, and I know the testimony [817] Kangas gave. A man's discharge or quitting is not an issue.

Q. (By Mr. Watkins) Mr. Hileman, at any time subsequent to Mr. Kangas' discharge, did you receive any word about Mr. Kangas' attitude towards you or the company? A. Yes, sir.

Q. Will you state approximately when?

A. Various times, but I suppose most of the ones I can recall are within the six months period after he left.

Q. Yes. What was the general nature of those statements?

A. Oh, that he was going to get me and put Thompson Products out of the aircraft parts business.

Q. Can you state any specific conversation in which this took place?

A. Yes. I had one conversation with Mr. Kearns.

Q. Do you remember about when that was?

A. I think it was in December of 1940.

Q. Yes. And what did Mr. Kearns say to you?

A. Mr. Kearns said he had seen Vic Kangas.

Mr. Moore: Just a moment. I will object to that, if it is hearsay, which I think it is.

(Testimony of Paul D. Hileman.)

Trial Examiner Whittemore: Is it something Mr. Kearns told you?

The Witness: Yes, sir.

Mr. Watkins: I think the objection is well taken, Mr. Examiner. I should have asked Mr. Kearns about that when he [818] was on the stand.

Q. (By Mr. Watkins) Mr. Hileman, did anyone else ever talk to you along a similar line about Mr. Kangas and his attitude towards the company?

A. Yes, other people did tell me much the same thing, but I can't pin it on any one individual.

Q. What about Mr. Porter? Did he ever make any statement to you? Mr. Lewis Porter?

A. Yes, sir, he did.

Q. All right. Will you state approximately when that took place?

A. Mr. Porter came into my office shortly after Mr. Kangas was discharged.

Q. About when was that? Fix the date.

A. About August of 1940.

Q. Who was present at this conversation you are about to relate?

A. Just Porter and myself.

Q. Will you state what was said by each of you at that time?

A. I asked Porter what he wanted, and he said he had come in to see me and tell me he was disgusted with Vic Kangas and his actions.

Q. What else did he say further than that?

(Testimony of Paul D. Hileman.)

A. He suggested the proper way for me to show my feeling on the matter was to hire Vic Kangas' wife. [819]

Q. Was there anything else in the conversation besides that about Mr. Kangas' attitude towards the company?

A. Yes. He said that Vic, who always referred to me, apparently, as "the old man", had told him that "the old man" had finally let him go, and that he would make him pay for it.

Mr. Moore: I will object to that answer and move that it be stricken.

Trial Examiner Whittemore: On what ground?

Mr. Moore: On the ground it, too, is hearsay.

Trial Examiner Whittemore: Well, I will overrule your objection.

Q. (By Mr. Watkins) Have you ever given permission, either directly or indirectly, to the Alliance to hold meetings of any character on company time or property? A. I never have.

Q. Did you have any knowledge of any committee meetings being held by the Alliance on company property, that is, other than the bargaining meetings with the management?

A. I was told of one they did hold.

Q. About when was that?

A. I believe it was about a year ago.

Q. By whom were you told?

A. Mr. Millman.

Q. What did you do about it? Did you give any instructions with respect to it? [820]

(Testimony of Paul D. Hileman.)

A. Yes, sir.

Q. To whom?

A. To Mr. Millman and Kearns, both.

Q. What was it you stated to them?

A. I told them under no circumstances was any committee meeting to be held on company time or company property either, and that I held them responsible for the enforcement of that rule.

Q. Have you ever received any telephone calls while you were at home from Lewis Porter?

A. Yes, sir.

Q. On more than one occasion?

A. Yes, sir.

Q. Can you fix the approximate date of any particular call, to start with?

A. I can fix only one, and I believe that was in October of last year.

Q. October, 1941? A. That is right.

Q. Where were you when the call was received?

A. I was at home.

Q. What time was it?

A. It was about 10:00 a. m., or a little later.

Q. Will you state what was said by you to Mr. Porter and what he said? [821]

A. Mr. Porter called me and said that he had worked a full day, or possibly more, making parts, and wanted me to know about it. I told him that—I think I thanked him for it, for his efforts, and told him sometimes we did get into a serious bind on shipments, and it was necessary for all of us to work as hard as we could.

(Testimony of Paul D. Hileman.)

He wanted me to meet him somewhere.

Q. That was that night?

A. Either that night or the next night.

Q. What did you say to him?

A. I told him it was too late, I couldn't meet him, and I suggested he come into my office to see me.

Q. What did he say?

A. He said that what he had to tell me was too confidential so that he couldn't see me at the plant.

Q. What did you say to him?

A. I told him I couldn't see him otherwise.

Q. Did you have any conversations of like character or any other telephone calls from Mr. Porter?

A. Yes. He called me several times. I think once more at home and once or twice at the office.

Q. Can you give me the substance of any of those conversations?

A. Yes, sir, they were all the same. He wanted to meet me some place and give me some highly confidential information. [822]

Q. Did you ever have any meetings with Mr. Porter, of any kind, except at your office or at the plant? A. I never did.

Q. Mr. Hileman, you have heard testimony with respect to the F. B. I. incident with Mr. Porter. If you testified with respect to that, would your testimony be substantially the same as that given by Mr. Millman? A. Yes, it would.

(Testimony of Paul D. Hileman.)

Q. Is there anything you can add to any conversations or anything with others that Mr. Millman didn't give? Just as briefly as possible, cover it.

A. No, Mr. Matthews came into the office and identified himself.

Q. To you?

A. Yes, sir. Beyond any doubt I knew who he was, and he told me Mr. Porter had gone to the F. B. I. with this bottle of oil containing emery grit, which he claimed either someone in the company had put in the oil cup of his machine, or someone in the plant had done it.

Q. Did Mr. Matthews tell you that?

A. Yes, sir.

Q. Was there anything else with reference to this matter that you could add to the story told by Mr. Millman? A. Yes, sir.

Q. What? [823]

A. After Porter talked with Matthews for, about, I think the third or fourth time he was in Mr. Millman's office. He turned in his badge and identification card, and Matthews came up to my office and came in the door in great haste, and said: "I haven't time to talk to you now. I have got to make sure this fellow doesn't give me the slip."

I didn't know what he was talking about, and he went out of the plant at that time. Later he came back, and said, "Well, I guess everybody's happy."

I said, "What do you mean?"

He said, "Well, I have solved my problem. Porter

(Testimony of Paul D. Hileman.)

is out of the plant, and I think he will be happy, and I think everyone will be happier."

Q. Did Mr. Matthews tell you anything with respect to anything which you are not at liberty to disclose here? A. Yes, sir.

Mr. Watkins: That is all.

Cross Examination

Q. (By Mr. Moore) Was Mr. Livingstone's purpose in coming out here in July of 1937 to install you as plant manager? A. No, sir.

Q. How long have you worked for Thompson Products altogether? A. About 15 years.

Q. You testified Mr. Livingstone referred to Mr. Kangas as a shop foreman, in his opinion. [824]

A. Yes, sir.

Q. Was that favorable reference or unfavorable?

A. It was neither one. He simply made a statement as to what he thought Vic Kangas' limitations were.

Q. And at that time was Kangas' position higher or lower than shop foreman?

A. That's what it was at that time.

Q. Did Mr. Livingstone indicate that he thought Kangas should remain in that position?

A. No, he didn't.

Q. Well, what was his purpose, as you understood it, in saying he considered Kangas a shop foreman?

A. Well, we were discussing the various men

(Testimony of Paul D. Hileman.)

who were in the plant, the foremen and the personnel of the plant. I had come in cold, and didn't know anyone, and also lacked any experience whatever in running a plant of that type.

Q. How did Kangas' name come up? Who mentioned it first?

A. I believe Mr. Livingstone did.

Q. Say what was said about Mr. Kangas.

A. Well, there was considerable friction between Mr. Dachtler, who was then acting plant manager, and Mr. Kangas, and the discussion as I recall it was about whether Mr. Dachtler was justified in his feeling about Kangas.

Q. State what was said about Mr. Kangas by Mr. Livingstone, if you can. [825]

A. I have already stated that. He referred to him as a shop foreman.

Q. He referred to him as a shop foreman or the shop foreman?

A. Maybe he said "the shop foreman."

Q. He just said: "Mr. Kangas is the shop foreman"?

A. I wouldn't be sure of that.

Q. He didn't recommend any change in Mr. Kangas' position at that time, did he?

A. No.

Q. Mr. Dachtler left the company shortly after that, did he not?

A. About a month after that.

Q. In your conversation with Mr. George Overlander, do you recall testifying as to that?

(Testimony of Paul D. Hileman.)

A. Yes, sir.

Q. What names were mentioned in connection with the presidency of the Alliance?

A. I testified Mr. Overlander brought up the name of Frank Osborne and Howard Baldwin.

Q. What did he say with respect to the men?

A. He asked me if I thought or felt that they would make suitable presidents of the Alliance.

Q. What did you say?

A. I told him I couldn't pass an opinion on the thing.

Q. Was anything said about their seniority? [826] A. No, sir.

Q. Nothing at all about their seniority?

A. No, sir.

Q. Did you ask Mr. Overlander about how long he had been in the plant?

A. I would have known how long he had been in the plant.

Q. Did you ask him? A. No, sir.

Q. You didn't discuss how long anyone had been in the plant? A. No.

Q. Was the name of Ed Fickle brought up at that meeting? A. No, sir.

Q. In any connection? A. No, sir.

Q. What was your purpose in asking Overlander to give you a few days to think the thing over?

A. To get him out of the office. He was rattling on at some length, and I couldn't advise him on what he wanted, so I said I was busy and rather than say, "Well, now, George, beat it out of here,"

(Testimony of Paul D. Hileman.)

I said, "Give me a couple of days and I will think about it."

Q. Did you say you couldn't advise him on the matter?

A. Yes. I told him that, told him that at the outset.

Q. But he persisted?

A. That's right. [827]

Q. You had the authority to order him out of the office? A. That is right.

Q. In the fall of 1937 did Mr. Porter take a vacation? A. Yes, he did.

Q. How long, do you know?

A. Two weeks.

Q. In that meeting with a representative of the War Production Board, do you know what union Smith and Spencer belonged to? A. Yes, sir.

Q. They were representing the C. I. O., were they not?

A. Yes, sir. I don't know that they were representing the C. I. O. I had asked them to come in.

Q. Why had you asked them to come in?

A. Well, I was extremely provoked at the action they had taken, which I considered unwarranted. I wanted them to hear Mr. Eiseman's story, and also I wanted them to hear my story as to why certain machinery was not running 24 hours a day.

Q. Why was it Smith and Spencer rather than some other two men?

A. They were the two who were running around the plant telling other people what a bum job was

(Testimony of Paul D. Hileman.)

being done by Kearns and the foremen because the machinery wasn't all running.

Q. Did you ever talk to Spencer about that? [828]

A. Yes, when I had him in my office.

Q. In the presence of Mr. Eiseman?

A. Yes, sir.

Q. Have you ever talked to him privately about it? A. Yes, sir.

Q. Has he quit running around the plant making detrimental statements?

A. I don't know.

Q. Did Mr. Kangas ever actually give you any trouble? Or was it all threats?

A. Well, it is a question of what you call trouble. He gave me trouble business-wise.

Q. Did he ever carry out his threats?

A. You mean to put us out of the aircraft parts business?

Q. Yes.

A. Yes, he attempted to.

Q. Did he ever cause any change in your status, or try to, to your knowledge?

A. You mean my position?

Q. Yes.

A. That would be very difficult for him to do.

Q. Did he ever do it?

A. I don't know he ever did.

Q. Or tried to?

A. He may have attempted to discredit me with the Cleveland [829] office.

Q. To your knowledge, did he? A. No.

(Testimony of Paul D. Hileman.)

Q. In these telephone calls that you received from Mr. Porter did he ever indicate what type of information he had to give you?

A. Only that it was something of an extremely confidential nature, that if I knew about, I would be very much concerned with.

Q. Did he never indicate the nature of it, except that it was confidential?

A. That is right.

Q. Did he ever mention anything about the Alliance? A. No, sir.

Q. The Alliance, had it been formed at the time you came to the plant?

A. Yes, it had been formed, at least I am told so.

Q. It requested bargaining rights shortly after you arrived? A. That's right.

Mr. Moore: That is all.

Mr. Watkins: Just one or two questions, please.

Redirect Examination

Q. (By Mr. Watkins) Mr. Moore asked you, I believe, whether or not Mr. Kangas had ever actually caused you any trouble. Was there any difficulty you had among the men in the plant [830] after Mr. Kangas left, as a result of statements he made? A. Yes, there was.

Q. Of what character?

A. Well, he circulated the rumor that I was going to discharge at least half of my foremen staff and possibly 40 or 50 men.

Q. Was there ever any wire received by your

(Testimony of Paul D. Hileman.)

head office which reflected on the morale of the people in the plant? A. Yes, sir.

Q. Subsequent to this date?

Mr. Moore: I will object to that and ask the answer be stricken, unless it is further identified.

Trial Examiner Whittemore: I will sustain the objection.

Mr. Watkins: May it be put in subject to strike, Mr. Examiner, because I do hope to have it identified.

Trial Examiner Whittemore: Well, I will permit you to.

Mr. Watkins: Subject to strike, and I will stipulate your objection runs to this line.

Q. (By Mr. Watkins) Will you state whether or not an investigation was made to seek the sender of that message? A. Yes, sir.

Mr. Watkins: That is all at this time with regard to that. The document I do not have here, and that is the reason why I cannot go any further; but I will refer to it later.

Q. (By Mr. Watkins) Mr. Hileman, you referred to an incident [831] involving the War Production Board, in your office. A. Yes, sir.

Q. Had the War Production Board officials made a checkup of your concern a short time prior to this meeting?

A. About six days before that two men from the War Production Board came out and talked at length with me and went through the shop with me.

(Testimony of Paul D. Hileman.)

Q. Did they, at that time, make any statements about how your plant was operating?

Mr. Moore: I will object to that as immaterial.

Trial Examiner Whittemore: I think the whole incident is, but since it has got in, finish it up.

The Witness: Yes. We were told if all shops were running as well as ours was running they would have no headaches at all. [832]

Redirect Examination

Mr. Watkins: Will you mark this as respondent's exhibit for identification next in order, please.

(Whereupon, the documents referred to were marked Respondent's Exhibits 8-A, B, C, 9-A, B, C, D, 10 and 11 for identification.)

Q. (By Mr. Watkins) Mr. Hileman, I will show you a document consisting of three pages, marked for identification as Respondent's Exhibits 8-A, B and C. Will you examine that and state what it is as to each page. What is 8-A, then 8-B, then 8-C.

A. Well, 8-A is a list of the types of die steels that we use in making valves. It also lists the other purposes to which those steels can be put.

Q. What about 8-B?

A. "B" is an inventory of the types of piston pin steels which we carried in 1939. It shows the size, progressively, and the amount on hand, and "C", I believe, is simply a recap [834] of "B"; I believe I am right. If I look at this—yes, that's what it is.

Q. Do you know who prepared 8-A, B and C?

(Testimony of Paul D. Hileman.)

A. Well, 8-A was prepared by Vic Kangas; 8-B was done by a stenographer, and 8-C might have been prepared also by Vic, but I am not sure of it.

Q. You are sure, though, 8-A was prepared by him?

A. Yes, that was one of his duties.

Mr. Moore: May I have the record read as to 8-B?

Trial Examiner Whittemore: Yes.

(The record was read.)

Mr. Watkins: I offer this as Respondent's Exhibit 8 in evidence.

Trial Examiner Whittemore: Any objection?

Mr. Moore: I will object to 8-C, inasmuch as it has not been identified, to my satisfaction anyway.

Trial Examiner Whittemore: Well, I don't think it has either. I will, however, ask for what purpose it is offered.

Mr. Watkins: I would rather, Mr. Examiner, put in these other exhibits and ask questions about them, than to disclose the purpose at this particular time.

Trial Examiner Whittemore: Then I will reserve ruling.

Mr. Watkins: All right.

Q. (By Mr. Watkins) I will show you, Mr. Hileman, Respondent's exhibit for identification, 9-A, B, C and D, and will [835] ask you what those are.

A. Well, those are letters that have to do with men who were to be laid off in the fall of 1939.

(Testimony of Paul D. Hileman.)

About that time there was a slackening up of our activities and I had asked Mr. Kangas to always notify me in writing as to the men who were being laid off, simply so that I could keep abreast of how many men were employed at any given time.

Q. Do you know, of your own knowledge, if those were prepared by Mr. Victor Kangas?

A. Yes, sir.

Q. Will you examine them and tell me whether or not you know of your own knowledge Mr. Kangas wrote the items written on 9-C for identification, and 9-D for identification, in pencil or in ink?

A. I wouldn't say on "C" that Mr. Kangas had written it. I would definitely say that on "D" in pencil, he had written that.

Mr. Watkins: At this time I will offer Respondent's Exhibit 9-A to D for identification into evidence.

Mr. Moore: I will object at this time that they are not shown to be relevant to the issues.

Trial Examiner Whittemore: Do you want to state your purpose at this time?

Mr. Watkins: No, I would rather put them all in, Mr. Examiner, and I assume the Examiner is going to reserve his [836] ruling on this also?

Trial Examiner Whittemore: I shall, unless I know what your purpose is.

Mr. Watkins: Yes.

Q. (By Mr. Watkins) I will show you, Mr.

(Testimony of Paul D. Hileman.)

Hileman, a document marked Respondent's Exhibit 10 for identification, and will ask you to state what that is and who prepared it, if you know?

A. Yes, I do know. It was prepared and written by Victor Kangas. It is a factory routing sheet for intake valve J-1244. We designate our replacement parts by numbers, and that is one of them, and he shows the routing in its proper order here through to the final operation, and he was the only man who made out these routing sheets at that time.

Mr. Watkins: I will offer Respondent's Exhibit 10 for identification in evidence at this time, Mr. Examiner, and state the purpose of offering these exhibits: And that is, to identify the handwriting and printing of Victor E. Kangas.

Trial Examiner Whittemore: I suggest first you remove the document that the witness has already stated he doesn't find handwriting on, or he doesn't know anything about.

Mr. Watkins: I think perhaps that would make it easier, Mr. Examiner.

Trial Examiner Whittemore: In the first place, 8-A is the only one which you identified. I think there was one [837] in 9.

Mr. Watkins: At this time I will withdraw my offer to put into evidence Respondent's Exhibit 8-B and C, and Respondent's Exhibit 9-A, B and C, and renew my offer as to Respondent's Exhibit now marked 8-A for identification, and suggest it be marked 8; Respondent's Exhibit 9-D for identi-

(Testimony of Paul D. Hileman.)

fication, and suggest it be marked Respondent's Exhibit 9, and Respondent's Exhibit 10 for identification.

Trial Examiner Whittemore: Could I see 10 for a moment. I didn't see 10. Do you have any objection to these, Mr. Moore?

Mr. Moore: No, no objection.

Trial Examiner Whittemore: All right. The documents are received.

(Whereupon, the documents referred to were received in evidence and marked Respondent's Exhibits 8, 9 and 10.)

COLLET STEELS

S.A.E.-3120

DIE STEELS

S.A.E.-6150	Mohawk Hot die
S.A.E.-6140	pompton
Seminole	Brabrum Talloy
LUDLUM #185	VASCO MARVAL TEST

PUNCH STEELS

Rex A.A. High Speed

CENTERS

Rex A.A. High Speed

utica

PUNCH DIES

REX - A.A.

NATIONAL LABOR RELATIONS BOARD

CASE NO. XVI-S-2088 BOARD PETITIONER / RESPONDENT EXT. NO. 5 Rec'd

IN THE MATTER OF Thompson Prod

DATE 10/7/42 WITNESS Hellemann

ETHEL E. FISHER, OFFICIAL REPORTER

BY M. Harney

FORM 1002

INTER-OFFICE LETTER

TO		WRITTEN FROM
Listed Below		
FROM		DATE
V. E. Kangas		October 6, 1939

cc: P. D. Hileman
J. W. Stewart
D. M. Cameron
V. E. Kangas

Employees laid off October 6, 1939

Clock No.	Name
41	C. F. Cunningham
77	Joe Walker
73	Ted Lay
48	James A. Watts
39	J. E. Clabaugh
57	Pearl Bosson
47	M. J. Clifford
69	R. L. McCoy
~~87~~	~~E. J. Barbens~~
5	George Erickson

Yours very truly,

V. E. Kangas

NATIONAL LABOR RELATIONS BOARD
CASE NO. XVI-C-88 EXHIBIT NO. 9-Leed
IN THE MATTER OF Thompson Prod
DATE 10/7/42 WITNESS Hileman
ETHEL E. FISHER, OFFICIAL REPORTER
BY J.M. Tarney

JADSON MOTOR PRODUCTS CO.
BELL CALIFORNIA

	5 1244	Direct Pay-roll	Pcs
Cut + Stock		1244 - 945	1200
upset + finish		1244 - 585	550
Work head		[illegible]	500
repeat Cutter		330	250
Thread		1125	1500
Straighten			800
Lever			800
Rolling		650	800
Turn Collar		360	300
Turn Head		375	350
Nipple		500	250
upset Body		(4) 50	(4)
Head machine		200	800
Head back End		720	600
Finish Stem		375	350
End grind		500	800
Finish Face		(4)	400
Ball Cleaner		1000	1000

NATIONAL LABOR RELATIONS BOARD
CASE NO. XVI-C-38 {BOARD / PETITIONER / RESPONDENT} EXHIBIT NO. 10-Reed
IN THE MATTER OF Thompson Prod
DATE 10/7/37 WITNESS Hileman
ETHEL M. FISHER, OFFICIAL REPORTER
BY M Varney

1 to 10

(Testimony of Paul D. Hileman.)

(Thereupon, Respondent's exhibits 8-B and C, and 9-A, B and C were withdrawn.)

Q. (By Mr. Watkins) Mr. Hileman, I will show you Respondent's Exhibit 11 for identification. Will you state what that is, please, without reading the contents of it. Just state what it is.

A. Yes; that's a wire which was addressed to Mr. Ray Livingstone at our Cleveland plant. The wire was filed in Compton, [838] California. Mr. Livingstone returned the wire to me for my information.

Q. That is a copy of the wire returned to you for your information?

A. That is right. I believe that is the actual wire.

Q. The original of it? A. Yes.

Mr. Watkins: Mr. Examiner, at this time, and referring to Respondent's 11 for identification, I would like to offer in evidence Respondent's Exhibit 2 for identification as being the handwriting or printing of Mr. Victor Kangas made during this hearing.

Trial Examiner Whittemore: Is there any objection?

Mr. Moore: No objection to Exhibit 2.

Trial Examiner Whittemore: All right. Respondent's Exhibit 2 will be received.

(Whereupon, the document heretofore marked Respondent's Exhibit 2 for identification, was received in evidence.)

I am sorry I didn't [illegible] in on
the kitty for the show [illegible] [illegible]
Presented [illegible] Unity [illegible] [illegible]
a damned good!

I am sorry I didnt get in on the kitti for the [illegible]

I Am Sorry I DIDNT GET

(Testimony of Paul D. Hileman.)

Mr. Watkins: I would like now to offer in evidence Respondent's Exhibit 11.

Trial Examiner Whittemore: Any objection?

Mr. Moore: Objected to as to materiality.

Mr. Watkins: I would like to have it understood that I may substitute copies, or photostatic copies, of any of these [839] documents.

Mr. Moore: No objection to that.

Trial Examiner Whittemore: And I want to hear some more about this before I rule on it. I don't see any materiality as yet.

Q. (By Mr. Watkins) All right. Mr. Hileman, referring to Respondent's Exhibit 11 for identification, will you state what you did with respect to that wire when you received it?

Mr. Moore: I will object to it as being immaterial, until it is connected up in some way.

Trial Examiner Whittemore: Let me get at this: Is it your plan to attempt, at least, to hook this up to Kangas?

Mr. Watkins: Yes, show it was sent by Mr. Kangas.

Trial Examiner Whittemore: To save calling this witness back, I have no objection. It will be stricken providing it isn't connected up.

Q. (By Mr. Watkins) Will you state whether or not you made any investigation to determine who sent this wire? A. Yes, sir, we did.

Q. Why did you make an investigation about it?

A. Because it was an obvious attempt to discredit the management of the West Coast plant

(Testimony of Paul D. Hileman.)

with the Cleveland plant. In other words, we knew of, or had permitted situations to exist in the plant which were not conducive of good morale within the organization. [840]

Q. Did you make any investigation to ascertain who sent the telegram?

A. Yes, sir, we did.

Q. Will you state what investigation you made in that regard?

Trial Examiner Whittemore: Well, first let us find out: Did you find out who sent it, to your satisfaction?

The Witness: Yes, sir.

Trial Examiner Whittemore: All right.

Mr. Watkins: Has this been admitted, now, Mr. Examiner?

Trial Examiner Whittemore: No, it hasn't. He hasn't testified to it as yet. The point is: I am not interested in any investigation unless it led somewhere.

Q. (By Mr. Watkins) Did you make an investigation and come to a conclusion as to who sent this wire?

A. I asked Mr. Millman to investigate the thing and report back to me.

Q. What did he report to you?

A. He reported that he had obtained a copy of the original wire. I also discussed it with our chief engineer, who is in charge of the inspection department, and who was over the party named in this wire.

(Testimony of Paul D. Hileman.)

Q. And did you make any conclusion from that investigation as to who had sent the wire?

A. Yes, we did.

Q. What was it? [841]

A. We concluded that Vic Kangas had sent it.

Mr. Watkins: Will you mark this as the next respondent's exhibit?

(Whereupon, the document referred to was marked Respondent's Exhibit No. 12 for identification.)

Q. (By Mr. Watkins) I will show you Respondent's Exhibit 12 for identification, and ask you what that is?

A. Well, that is a photostatic copy of the original wire that was addressed to Mr. Livingstone in Cleveland.

Q. And you obtained the original wire and had it photostated, from the Western Union Telegraph Company? A. Yes, sir.

Mr. Watkins: I offer this, Mr. Examiner, as Respondent's Exhibit 12 in evidence.

Trial Examiner Whittemore: Any objection?

Mr. Moore: No objection.

Trial Examiner Whittemore: All right. The document is received.

(Whereupon the document heretofore marked Respondent's Exhibit No. 12 for identification, was received in evidence.)

RESPONDENT'S EXHIBIT NO. 12

CLASS OF SERVICE DESIRED			
DOMESTIC		CABLE	
TELEGRAM		ORDINARY	
DAY LETTER		URGENT	
SERIAL	✓	DEFERRED	
NIGHT LETTER		NIGHT LETTER	
SPECIAL SERVICE		SHIP RADIOGRAM	

Patrons should check class of service desired, otherwise the message will be transmitted as a telegram or ordinary cablegram.

WESTERN UNION

1207-B

1941 JAN 7

R. B. WHITE, PRESIDENT
NEWCOMB CARLTON, CHAIRMAN OF THE BOARD
J. C. WILLEVER, FIRST VICE-PRESIDENT

CHECK
ACCOUNTING INFORMATION
PM TIME FILED 48

Send the following message, subject to the terms on back hereof, which are hereby agreed to

COMPTON, CALIF JAN 1941

To THOMPSON PRODUCTS CO

Street and No. CLARK WOOD ROAD

Place CLEVELAND OHIO

ATTENTION RAY LIVINGSTONE

AN EMPLOYEE IN OUR PLANT LADEAN GREGG INSPECTION DEPTMENT CARRYING AFFAIR LEROY SHADRACH INSPECTION FOREMAN. CAUSING SEPARATION IN SHADRACH FAMILY ALSO MUCH CRITICISIN IN PLANT PET IN DEPT DISSATISFACTION OTHER EMPLOYEES IN DEPARTMENT SUGGEST SOME THING BE DONE

EMPLOYEE AND OLD GUARD,
THOMPSON PRODUCTS WEST COAST PLANT
8354 WILCOX AVE. BELL CALIF

Sender's address for reference

Sender's telephone number

(Testimony of Paul D. Hileman.)

Mr. Watkins: Has there been a ruling yet on Respondent's Exhibit 11? This is simply a copy of the original of 11.

Trial Examiner Whittemore: Well, I will receive 11 at this time. It is the same thing. I think that is the only [842] important one. Eleven isn't particularly important, except to show why he took certain action.

(Whereupon the document heretofore marked Respondent's Exhibit 11 for identification, was received in evidence.)

RESPONDENT'S EXHIBIT No. 11

Western Union Telegram

WU J31 47 NT 10 Extra Compton Calif Jan 7
Thompson Products Co.
Clark Wood RD Attn Ray Livingstone

An employee in our plant Ladean Gregg inspection department carrying affair Leroy Shadrach inspection foreman. Causing separation in Shadrach family also much criticism in plant pet in dept dissatisfaction other employees in department Suggest something be done.

Employee and old guard Thompson Products West Coast Plant 8354 Wilcox Ave Bell California. 8354. Jan. 8 857A

Q. (By Mr. Watkins) Mr. Hileman, in coming to your conclusion as to your statement that Mr.

(Testimony of Paul D. Hileman.)

Victor Kangas wrote the wire, did you compare Respondent's Exhibit 12 with the handwriting which you had, such as that contained in Respondent's Exhibits 8, 9 and 10?

A. That is right. That, plus the fact that we, as I started to say, discussed it with our chief engineer and he in turn talked with the man who is named in the wire, who immediately said that it was his belief that Vic Kangas had sent that wire to cause him trouble in the company.

Mr. Watkins: I think that is all.

Mr. Moore: No questions.

Q. (By Trial Examiner Whittemore) This was after you had already discharged Kangas, wasn't it?

A. That is right.

Q. Was it about six months after that?

A. Is that in January?

Q. 1941.

A. That is right, about six months; about five months.

Trial Examiner Whittemore: All right. You are excused. [843] Thank you.

(Witness excused.)

Mr. Watkins: I would like to call Mr. Harris.

Mr. Moore: Before we begin with the testimony of this witness, may I be excused for about two minutes?

Trial Examiner Whittemore: Surely. We will take a two minute recess.

(A short recess.)

JOHN L. HARRIS

a witness called by and in behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Watkins:

Q. Will you give your name to the reporter?

A. John L. Harris.

Q. Will you state your occupation, Mr. Harris?

A. Examiner of questioned documents.

Q. Will you state very briefly and not to exceed two minutes your qualifications, your experience?

A. I have been in this work for about 25 years. I was formerly located in Seattle. I moved to Los Angeles 7 years ago. I have testified in the Federal Courts, Superior Courts, Municipal Courts, in most of the Western States; in fact, all of them.

Q. Were you requested by someone from the respondent in this case, Thompson Products, Inc., to make an examination of a [844] particular document? A. Yes.

Q. Was that document Respondent's Exhibit 12, which I now show you?

A. Yes, which is a photostat of a telegram.

Q. In connection with that exhibit, did you examine documents which are now in evidence as Respondent's Exhibits 8, 9, 10 and Respondent's Exhibit 2? A. Yes.

Q. Did you come to a conclusion as a result of that examination as to who wrote Respondent's Exhibit 12? A. Yes.

(Testimony of John L. Harris.)

Q. What is your conclusion in that regard?

A. My conclusion—I might state my conclusion is based upon the fact that these various exhibits, Respondent's Exhibits 8, 9, 10 and 2 were all in the handwriting of the same person, and in making a comparison of those four exhibits with Respondent's Exhibit 12, I reached the conclusion that the same person wrote all of the documents.

Mr. Watkins: That is all.

Mr. Moore: No questions. [845]

Mr. Baldwin: Mr. Examiner, may I put one witness on the stand?

Trial Examiner Whittemore: Surely, if that is agreeable to you, Mr. Watkins.

Mr. Watkins: Yes, it is.

SUSAN RICKARDS

called as a witness by and in behalf of the Alliance, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Baldwin:

Q. Your full name, please?

A. Susan Rickards.

Q. For whom do you work?

A. I work for the Aerial Corporation.

Q. How long have you been there? [846]

A. I started to work there the latter part of November or the first part of December, 1941.

(Testimony of Susan Rickards.)

Q. Do you know Mr. Victor Kangas?

A. Yes, I do.

Q. How long have you known Mr. Kangas?

A. Well, I have been employed by Mr. Kangas for a period of nine months, I would say, eight and one-half months. [847]

Mr. Baldwin: She didn't state she worked for them.

Trial Examiner Whittemore: What any man said during the past nine months, what has that got to do with the issues in this case?

Mr. Baldwin: I thought it was important for this reason: That Mr. Kangas has a tendency to, or at least I gathered, has tendency to ask people to join organizations.

Trial Examiner Whittemore: This witness says he didn't ask her. Whatever he may have said has nothing to do, it seems to me, with the issues involved in this case. Suppose he was a paid organizer for the C. I. O. at the present time? What difference would that make?

Mr. Baldwin: It could make this much difference: That if he has a tendency to meddle in labor's problems in business, why, he might have done it at Thompson Products, and he might have bothered our members at that time. [848]

Mr. Moore: Well, that's what the allegations of the complaint are.

Mr. Watkins: It might show bias, also, Mr. Examiner, very definitely I think.

Trial Examiner Whittemore: I tell you frankly

(Testimony of Susan Rickards.)

I do not consider it material. If you consider it so—is this going to be very brief?

Mr. Baldwin: I hope to make it just as brief as possible, sir.

Trial Examiner Whittemore: Go ahead. [849]

Q. Was that all there was to the conversation?

A. No, that was not.

Q. What else was said by Mr. Kangas?

A. I got up to leave, and then I said, "Well, if that's the way it stands, all right."

I got up to leave; as I opened the door to leave Mr. Kangas told me—this was about three days before, he stated, "If you want to know what to do about it, I would go C. I. O., as the shop is going C. I. O.; we know that." That was three days before the election.

Q. Was that all the conversation you had with Mr. Kangas at that time?

A. He did state the fact he thought the C. I. O. was a far better union. [850]

Q. He did say that to you?

A. Yes, he did. [851]

Trial Examiner Whittemore: Take your time and answer the questions to the best of your ability and then you won't have to change your answers. Did he suggest it?

The Witness: Yes. He suggested I join the C. I. O.

Trial Examiner Whittemore: When?

The Witness: It was about three days previous to the election.

(Testimony of Susan Rickards.)

Trial Examiner Whittemore: This is the same occasion you have testified about?

The Witness: Yes, sir.

Trial Examiner Whittemore: He asked you if there was [855] any other time.

The Witness: No, there wasn't any other time in particular.

Trial Examiner Whittemore: All right, then, that is the answer to your question.

Q. (By Mr. Baldwin) What did Mr. Kangas say to you, his exact words?

A. You mean previous to three days before the election?

Q. Just his words.

A. As I got up ready to leave he called me back and he stated the fact that the C. I. O. would be going into the shop, and that it was a far better union to go into, that they were going to get it. In other words, he gave me the choice, if I wanted to be on the winning side, he gave me an idea of what to do about it.

Mr. Baldwin: That is all.

The Witness: And it was a far better union, to his estimate. [856]

Trial Examiner Whittemore: This seems to be an academic discussion. If there is any question in your mind that you have not been permitted to answer questions fairly, I want to know about it. But let's not enter into an academic discussion.

The Witness: The point was to prove Mr. Kangas had authority, and he did speak to other em-

(Testimony of Susan Rickards.)

ployees as to how he believed, and how things should be run. There aren't the questions asked me where I can give an answer. After all, this was no frameup. The matter was put up there for me to answer questions the way he wanted me to, and I thought to answer that way of "no" was wrong. If I would be permitted to tell my story, how this happened when the union first came into the Aerial Corporation, I think it would have a lot more bearing on the case.

Trial Examiner Whittemore: On what case?

The Witness: On how Mr. Kangas does go around and speak his viewpoint and feels people should be made to believe in his viewpoint. [858]

Q. Now, let us not go into that. That would be a long discussion.

A. Can we go into that long discussion? I think each person, you should take as an individual; you can't just take a whole group of people and put them together and pass on the same thing; each have different stories, perhaps it is the same thing in the long run, but each stated it in different words. They were all converted to C. I. O.

I know the girls in that group, some of them were not going to go union at all. I was absent one day from work and when I returned I was asked if I had joined up with the union. I said, "No, I haven't. What have you girls done?" [860]

They said, "We have joined."

I said, "What brought that on?"

(Testimony of Susan Rickards.)

They said, "Well, we were handed cards, and Mr. Kangas said it was perfectly all right for us to go C. I. O.; and if he was good enough to fight for us the least we could do was to do what he wanted to us to do."

Q. This was at the Aerial Corporation?

A. Yes.

Q. Have you made your full statement?

A. Yes, I have. [861]

The Witness: Well, so far as that goes, so far as the Aerial Corporation, most naturally, they are out of this. But I do know, so far as Mr. Kangas is concerned he has done it, so far as that goes, talked for the C. I. O., knowing how the circumstances were down at the shop. It's a very small shop employing about 50 to 60 employees, I believe, and it is not a very large shop. We do talk and get acquainted with one another.

Mr. Moore: I now object.

Trial Examiner Whittemore: Let her finish. Will you [863] please make it brief?

The Witness: The fact is that I do happen to know for a fact that that shop was going A. F. of L. because it seems like most of the men were going in that.

I was presented with a button. Of course, I am neither. I was neutral to the whole thing, and I was presented with the button by one C. I. O. man, which I returned, stating I had not quite decided what to do.

(Testimony of Susan Rickards.)

Mr. Kangas had passed out the cards, and the girls signed them against their own better judgment, which I know that is a fact, because when they had the impression one man was helping them out, they thought that they should, in return, do all they possibly could for him.

He has a very nice way of presenting himself, when it comes to the employees; and that was misrepresentation, because you talk to one, and they tell you to do as you please; and that was something Mr. Kangas or any of the other officials in there had no right to say or quote, what they thought of either union. They should not have showed any partiality to either one. And Mr. Kangas has showed partiality to the C. I. O., and he has turned the employees to the C. I. O., making him think he was with them 100 per cent.

And Mr. Kangas walked out on those boys before the whole thing was settled, which should not have been done, to my estimation. He should have finished the whole thing through, [864] and he did leave those boys, just like he said, "Well, boys, I have got it started; now, you fight it out yourself." And that was not right nor was it fair.

I am not contending for anyone, or against Mr. Victor Kangas, so far as any personal reasons are concerned, but you wanted to find out how he was in the habit of working out these things, and that is the way he worked it out, through misrepresentation. [865]

RAYMOND S. LIVINGSTONE

called as a witness by and in behalf of the Respondent, having been first duly sworn, was examined and testified as follows: [866]

Direct Examination

Q. (By Mr. Watkins) Will you give your full name to the reporter.

A. Raymond S. Livingstone.

Q. Mr. Livingstone, will you state what your connection with Thompson Products is?

A. I am director of personnel.

Q. You are located where?

A. My office is in Cleveland, Ohio.

Q. How long have you occupied that office?

A. Since 1937.

Q. What part of 1937?

A. Since about March of 1937.

Q. Did you make a visit to what is now the West Coast Division of Thompson Products, Inc., in the year 1937? A. I did.

Q. Can you state when that was?

A. My first visit was the early part of June, 1937.

Q. What was the purpose of your visit?

A. That was because there had been charges made against the company by the C. I. O. that two men had been discriminatorily discharged.

Q. And while you were out here on that visit did you investigate those charges?

A. I did. [867]

(Testimony of Raymond S. Livingstone.)

Mr. Moore: I will object to it as immaterial, and I will ask that the answer be stricken.

Trial Examiner Whittemore: Well, I don't know the purpose. You merely want to identify why he came out?

Mr. Watkins: Yes. That is all it has to do with it.

Trial Examiner Whittemore: Suppose you withdraw your question as to whether or not he investigated it.

Mr. Watkins: All right. I will withdraw the question. No, Mr. Examiner, I will take that back. I would rather have the question in, because I have asked the purpose of his visit and if he did come out here and investigated it, it is pertinent to the case.

The Witness: I might say that wasn't the only reason I came out here. There was a secondary reason in connection with it.

Q. (By Mr. Watkins) Will you state what the other reasons were you came out on your first visit?

A. Mr. Klegg, executive vice-president of the organization, asked me, also, to check into conditions in the plant, from the entire standpoint of personnel administration.

Q. About when did the company acquire the West Coast plant?

A. I believe a month or two before my trip.

Q. While you were out on this first visit did

(Testimony of Raymond S. Livingstone.)

you have any discussions with the personnel in this division? A. Yes, sir. [868]

Q. Will you state briefly what talks you had with the personnel.

A. I had talks with the entire administrative organization and also with many of the fellows in the plant. I talked with Mr. Dachtler, who was then the acting manager of the plant. I met Mr. Clark, who was the factory manager. I met Mr. Kangas, who was termed, I think, foreman, or on some occasions acting assistant works manager, or something of that nature. I met Alex Robb, the engineer, and Max Rogers; a number of people.

Q. Did you talk to some of the men during this time, also? A. Yes, I did.

Q. In connection with that, what did you find out, just briefly, as to the conditions which existed at this time among the workmen?

A. They were very unsettled and there was much dissatisfaction and nervousness.

Q. Did any of the men make any statements to you about their attitude in that regard?

A. Yes. A number of men asked me what we were going to do with the company, whether we intended to continue operating it, or whether it was going to be closed down. There was some questions asked me about wages.

Q. What did you state about closing down the plant?

A. I told them that there was no intention on our part of [869] closing down the plant.

(Testimony of Raymond S. Livingstone.)

Q. Did you have a conversation, did you say, with Mr. Victor Kangas at this time?

A. Yes, I did.

Q. Did you have more than one conversation with him?

A. Yes, I had several, on that first trip.

Q. Can you state, as nearly as you can recall, specific conversations with Mr. Kangas. When they occurred and where?

A. No, I can't fix the times. There were several conversations in a four or five day period.

Q. Were there any discussions of unions in any way, with Mr. Kangas, in these conversations?

A. Yes. At the time I was getting the story from him as to why these two men had been discharged, I asked him what the union situation was in the plant.

Q. What did he tell you?

A. He said it was mostly C.I.O., there were many C.I.O. people.

Q. Did he state any percentage figure of any kind? A. I can't recall he did.

Q. On your second visit to the plant, you made a second visit to the plant after that, did you not?

A. I did.

Q. Can you state when you arrived in Los Angeles on your second visit? [870]

A. Yes, I arrived on the morning of July 23rd.

Q. Of 1937? A. 1937, yes.

Q. What was the purpose of your second visit?

A. To install a complete personnel system in

(Testimony of Raymond S. Livingstone.)

the plant, and also probably to aid in the introduction of a wage incentive system that was being put in at that time.

Q. Did you extend your visit after you got here to a longer period than you had originally anticipated? A. Yes, I did.

Q. Why was that?

A. I originally planned to stay only five or six days. Then, Mr. Klegg, the executive vice-president, phoned me that he was coming out, and that Paul Hileman was going to be appointed manager of the plant. Mr. Klegg wanted me to stay and help Paul with this wage incentive system and generally guide him, as I was familiar with many of the people in the plant and Paul was a stranger to the company.

Q. Did you have any meetings on this second visit with Mr. Charles Rogers, who was then the chief organizer for the C. I. O. at the plant?

A. I did.

Q. Where did such a visit take place?

A. At the Jonathan Club.

Q. When? [871]

A. As I recall it, that was sometime during the week, or the Monday following my arrival in town.

Q. Will you state who was present at the meeting with Mr. Rogers.

A. Mr. Hileman and myself.

Q. Will you state what was said by each of you at that meeting?

A. Mr. Rogers had phoned me at the plant and

(Testimony of Raymond S. Livingstone.)

said he wanted to meet with me and discuss the Jadson situation. I said all right, and I agreed to meet him down at the Jonathan Club.

Mr. Hileman went down with me, and he was sitting in the lobby there; he was the only man waiting. We went upstairs and had lunch. During lunch he, too, inquired as to what we were going to do with the plant, whether we were going to close it up or continue operating it. He asked something about our wages, what was our wage level there. He asked about the independent union that had started just about that time, and what I knew about it, and whether we had done anything about it. I said we hadn't.

He said, "I am investigating that now," and he said, "If I find out that everything is all right, you are never going to hear any more from me. I am convinced you people are honest and sincere in what you are going to do in this plant." [872]

"But," he said, "if I find out it is not as you tell me it is, then you are going to hear more from me."

Q. Was that the end of your conversation with Mr. Rogers?

A. That was the end of it, although I did get a very nice letter from him saying he enjoyed the meeting and enjoyed dinner and hoping to see me again sometime.

Q. Mr. Livingstone, you have heard some testimony here with respect to a meeting at Uncle Gabriel's cabin, I believe it was called?

A. Yes, sir.

(Testimony of Raymond S. Livingstone.)

Q. Do you remember about the meeting?

A. Yes, sir.

Q. Do you remember why it was held?

A. Yes, sir.

Q. Why was it held?

A. Well, the best way to explain it is this: The independent union was going to have a meeting; either Vic Kangas or Lyman Hodges came in to Mr. Dachtler's office while I was there and said that a couple of the foremen had asked whether they should go to the independent union meeting. And both Dachtler and I told either Hodges or Kangas, whoever it was, "Lord, no," they were supposed to stay away.

After whoever we were talking to left the office, and it is not clear in my mind, I said to Mr. Dachtler that we ought to get the foremen together and bring them up to date [873] on this situation, what was going on in the plant, or what we intended to do, and warn them specifically to keep out of the picture.

Mr. Moore: I will object to this narrative form of testimony.

The Witness: Well, that's what I told him.

Mr. Moore: I don't doubt that, Mr. Livingstone. However, we should have this in question and answer form in order that we may interpose an objection, if something material comes up.

Trial Examiner Whittemore: I will permit it. I will overrule your objection. He has simply tes-

(Testimony of Raymond S. Livingstone.)

tified to what he and Dachtler were talking about.

Mr. Watkins: And the why of the meeting.

Trial Examiner Whittemore: The why of the meeting, he hasn't got to the meeting yet.

Mr. Watkins: No, I haven't asked him about it.

Q. (By Mr. Watkins) Was that substantially the reason for the meeting?

A. Those were the circumstances leading up to the meeting.

Q. Yes. How was the meeting arranged?

A. Then, I believe Dachtler called in Hodges and asked Hodges where would be a place convenient to the plant to have a meeting. I think there was some mention on my part of having it downtown, but someone suggested it would be [874] better to have it out near the plant. Hodges, as I recall, said that Uncle Gabriel's was close by, and you could get good food, and that would be the place to go.

So Dachtler told him to check with the foremen and find out when a convenient time would be.

Q. Was this to be a meeting only of supervisors?

A. Just supervisors, yes.

Q. When was this meeting held?

A. I don't know exactly when it was held, but it was sometime near the latter part of that week.

Q. Of which week is that?

A. Well, I arrived on July 23rd, and it was sometime during the end of the following week, probably on a Thursday or Friday; I am not quite

(Testimony of Raymond S. Livingstone.)

sure. I am not sure at all of the date, but I know it was during that week and towards the end.

Q. Then you did have a meeting?

A. We had a meeting, yes.

Q. Was there any particular speaker? Any formality to it?

A. No, there wasn't; it wasn't that kind of a meeting.

Q. Can you state briefly what was said at this meeting by you and by the others?

A. Well, it was a very informal meeting, and I think Mr. Dachtler led off by saying that we had called the boys together to specifically explain why they weren't to take any part in guiding or directing this independent union that had started. [875]

Then he asked me if I would tell them something about the Wagner Act, which I did. I told them the employees had a right to organize. I said they should be very careful about this matter, because as I understood it, there had been A. F. of L. and C. I. O. interested in the plant at that time, in fact I—no. Then we got that part of it out of the way.

Then some of them asked me how we bargained in Cleveland and in Detroit. I told them that in Detroit we had relationship with the C. I. O. We had signed the first sole bargaining contract in the history of the automotive industry with the C. I. O. in Detroit. I told them we had just had one headache after another with the C. I. O. after signing the contract, which was considered to be a model

(Testimony of Raymond S. Livingstone.)

contract, we had had three sitdown strikes in three months.

Then I told them in Cleveland we had an independent union, and I told them our relationships had been satisfactory with that. Then, other points that I made were, that regardless of what organization represents the fellows, they are still our own fellows, it is still the same company, and we should treat everybody fairly, settle grievances promptly, because major matters grow out of little things that aren't settled on time; and there was just so much the company could give.

Q. Was anything said in this meeting about moving the plant back to Cleveland or closing the plant out here in case the [876] A. F. of L. or C. I. O. got in?

A. No. In fact, there was no discussion of that type at all.

Q. After that meeting did you have any meeting with Victor Kangas in which there was any conversation about his obtaining a trusted employee to form an independent?

A. Absolutely not. In fact, I warned everybody at that meeting, at the conclusion as well as at the start, that they were to strictly keep hands out of the union meeting—union matters, and I also explained to them about discharging people. I talked to them about the Blankenship case, and the MacIntosh case, explaining the necessity for records——

Q. When you refer to the two cases, one of

(Testimony of Raymond S. Livingstone.)

which was the MacIntosh, you mean the discharge cases about which charges were brought in the National Labor Relations Board?

A. That is right, yes.

Q. Mr. Livingstone, referring now to a period during the second meeting, did you have a meeting with Mr. Lewis Porter at the Jonathan Club?

A. I did. You mean during my second visit?

Q. Yes. I said the second meeting; I meant the second visit. Will you state how that meeting came about.

A. Yes, sir.

Q. All right.

A. On Saturday morning after I had arrived——

Q. This was the day after you arrived? [877]

A. Yes, sir. I arrived on a Friday morning and I didn't go into the plant at all that day. I went out to the plant, but not in it; and the following morning I walked out through the shop just to look around, and I visited with six or seven people. And after I got back in the office, in Dachtler's office, and Dachtler was there, Vic Kangas came in, and said, "Lou Porter wants to talk to you again."

I said, "Who is Lou Porter?"

He said, "Well, you were just talking to him out there in the shop."

I said—this isn't the exact conversation, but it went approximately like this: I said, "I talked to several of them," and I just didn't know who Lou Porter was.

"Well," he said, "He was the old man who runs the roll straightener down there."

(Testimony of Raymond S. Livingstone.)

I said, "Oh, yes; I remember him." And I told him to come in.

Vic smiled and he said, "I don't think he will; he's sort of a funny fellow and he always thinks people are watching him."

I said, "Tell him to come out here." Vic says, "All right. I will see."

He left the office and went into the shop and he came back four or five minutes later and said, no, he wouldn't come in, but he said he would like to meet you outside the [878] plant. And he said. could he drop downtown and see you where you are staying.

I said, "Okeh. I think so."

And Vic said, "It's worthwhile talking to him."

Q. Did he at that time discuss Porter to you in any way other than what you have already stated?

A. He did say Porter tells many things about the shop.

Q. Go ahead. Did Mr. Porter telephone you before he came down to the Jonathan Club?

A. No.

Q. What was the first you knew about his being at the Jonathan Club?

A. Well, the phone rang and the captain in the lobby said a Mr. Porter was there to see me.

Q. Did Mr. Porter then have a visit with you at that time? A. Yes, he did.

Q. Where did that take place?

A. Up in my room.

(Testimony of Raymond S. Livingstone.)

Q. Do you remember who was present?

A. I heard it testified that Mr. Dachtler was there, but I just have no recollection at all about Mr. Dachtler's being there. In fact, I would be almost sure he wasn't there, because Porter was the kind of a fellow if anyone else was around he just wouldn't talk.

Q. What was said by each of you at this meeting? [879]

A. It started off this way: Porter said, "I saw you in the shop this morning and," he said, "I like your looks." He said, "I think you do business okeh."

This isn't the exact conversation, but this is the substance of it, and this is what it all meant.

He said, "You know, the C. I. O. is trying to get in your plant out there."

And I said, "Yes. I have been advised that they were."

He said, "Well, I don't want to see this company get in any trouble. I have been there a couple of years now and they have always treated me well," and he said, "I don't want to see you get in any trouble."

He said, "I will be glad to go to union meetings for you and I will keep you advised as to how it is going along and maybe I can steer it a little bit so there won't be any trouble."

Q. Did he say anything about Kangas at all in connection with this statement? A. No, sir.

Q. Go ahead.

(Testimony of Raymond S. Livingstone.)

A. Then he continued along that line. Well, I stated to him rather gently and kindly: "Mr. Porter, we are really not interested in that sort of thing." I told him that arrangements of that nature generally resulted in trouble, and I just didn't want him to do anything like that. I said, [880] "Everything we are trying to do in this company is the right thing, and I think we have got some good, level headed fellows out there, and they will recognize the right thing when they see it."

Then he asked me what we were going to do in this plant. He said, "Are you fellows going to close it up and fire a lot of people?"

I told him no, we had no intention of closing the plant. That we didn't buy plants to close them up. That we hoped to have a West Coast Division.

He talked to me about wages being low and that some of the fellows there thought they ought to have vacations. He said there was favoritism in the shop and the wrong people were promoted at different times, and generally along that line. I answered most of the things he talked to me about, and I told him our feeling about them.

The meeting wound up this way: He said he enjoyed the visit, that he had had a fine talk, and he said: "Would you be willing to talk to some of the fellows in the shop if they come in?"

And I said, "Well, we are willing to talk to anybody." And we said goodnight, he said he had got to be on his way, and he left.

(Testimony of Raymond S. Livingstone.)

Q. Did you at any time in that meeting or in any other meeting make any promise to Mr. Porter of any vacation? [881]

A. Absolutely there was no discussion of that type, of any nature at all.

Q. Or any money of any character?

A. No, sir.

Q. Or any lifetime job for better salary or anything of that kind? A. Absolutely not.

Q. Never at that time or any other time. Is that correct? A. That is right.

Q. Did you ever give any paper to Mr. Porter?

A. Absolutely not.

Q. You heard Mr. Porter's testimony about your handing him a paper at his machine?

A. I did.

Q. Did you do what he said you did?

A. No, sir; that never happened.

Q. Did you have a second meeting at the Jonathan Club with Mr. Porter?

A. I heard that testimony too, and I have absolutely no recollection of any second meeting. In fact, I can't think of a single reason why there would be a second meeting.

Q. You don't remember Mr. Porter contacting you again about a further meeting?

A. No, sir.

Q. Are you in a position to testify whether or not you did [882] say anything to either Mr. Porter or Mr. Kangas about doing a bang up job, or whatever it was they said you said?

(Testimony of Raymond S. Livingstone.)

A. Those things were just never said.

Q. But you don't recall whether or not you had more than one meeting with Mr. Porter?

A. I don't remember ever having more than one meeting at the Jonathan Club. On this Saturday night I am quite positive it was with Mr. Porter. I saw him after, in the shop, in 1939, and later, but that's the only meeting I ever had with him.

Q. Mr. Livingstone, I believe you heard Mr. Victor Kangas testify about a telephone call that he made to you on or about 7:00 o'clock some evening? A. Yes, sir.

Q. In connection with that call you gave him some kind of data to put on cards. Did you ever have such a conversation as that with Mr. Kangas?

A. That conversation just never happened.

Q. Did you ever give any instructions of any kind to Mr. Kangas about organizing an independent union?

A. No, sir. I told him to keep his hands out of it.

Q. Did you ever make any statement to Mr. Kangas about beating any C.I.O. meeting or beating the boys to the punch on the C. I. O. meeting, or anything of that kind?

A. No, sir. I have no recollection of any C. I. O. meeting being held at that time. [883]

Q. Did you at any time make any promise of any reward of any character to Mr. Kangas in connection with anything he might do about union affairs in the plant? A. Absolutely not.

(Testimony of Raymond S. Livingstone.)

Q. Or union affairs concerning the plant?

A. Right.

Q. Did you ever make any suggestion for a name in this plant, Jadson? A. No.

Q. Mr. Livingstone, directing your attention to a meeting which was held with management by a group of men, sometime in the latter part of July of 1937, do you recall a meeting where a group of men from the plant came in to see the management? A. Yes, sir.

Q. Do you recall when you had the first knowledge of any desire on the part of those men to call upon the management? A. Yes, sir.

Q. When was that?

A. It was sometime in the morning; I was in Mr. Dachtler's office, and either Vic Kangas or Lyman Hodges came in and said some of the boys in the plant wanted to talk to us.

Q. What did you say then?

A. I asked Mr. Dachtler what about it. He said: "Do you think we ought to talk to them?" [884]

And I said, "Sure; see what they want."

Q. Did anyone suggest any particular time for the meeting?

A. I told either Vic or Lyman, I don't remember who it was, I think it was Vic, to tell the boys to come in after quitting time.

Q. Who was present from management at this meeting which was held with the men?

A. Mr. Dachtler and myself.

Q. Was Mr. Kangas there? A. No, sir.

(Testimony of Raymond S. Livingstone.)

Q. How many men were there from the plant, would you say, at that meeting?

A. I would say there were 18 to 20.

Q. Did anyone act as leader, particularly, in that group?

A. No. There was just a general discussion.

Q. Can you state what any of the men said to you when they first came in, so that you knew what they were in there for?

A. Well, the door had just about been closed when one of them said, "We're in here to find out if you will recognize an independent union."

Q. Was there any discussion during the time they were in—strike that.

How long were the men in there, would you say?

A. I don't think they were in there over eight or ten minutes.

Q. Was there more than one man that talked in this meeting [885] from the group?

A. Yes, sir.

Q. Were there any other matters discussed by the men or questions raised by the men other than the question of an independent union?

A. After we had answered that first question, that seemed to be all they wanted to know.

Mr. Moore: I object to the form of this testimony. This is a rather important matter, and I think in this particular instance we ought to get what was said.

Trial Examiner Whittemore: I will sustain the objection.

(Testimony of Raymond S. Livingstone.)

Mr. Watkins: All right.

Q. (By Mr. Watkins): Will you state, Mr. Livingstone, anything that was said by any of the men in addition to this request for recognition if they formed an independent union?

A. I can't recall anything specifically, except that in effect some of the men said, "We do want to talk to you about wages, and we do want to talk to you about some other things here in the company."

Q. Did you ever talk with Mr. Kangas, subsequent to this meeting, about it?

A. About what?

Q. About the meeting. A. I did.

Q. How soon after the meeting did that conversation take [886] place?

A. About ten minutes after the boys had left the office Kangas came in. Dachtler asked him where he had been. Dachtler was rather provoked because Kangas hadn't been in the meeting.

Q. What did Kangas say?

A. Kangas said he had some things out in the shop he had to do, I believe getting a second shift started, and then he said he wanted to talk with the boys after they came out of the meeting.

Q. Were there any cards of any kind presented by this group of men to the management after this first meeting? A. No, sir.

Mr. Watkins: Will you mark this next in order, please.

(Testimony of Raymond S. Livingstone.)

(Whereupon, the document referred to was marked Respondent's Exhibit No. 13 for identification.)

Q. (By Mr. Watkins): I show you, Mr. Livingstone, the document which has now been marked for identification as Respondent's Exhibit 13, and ask you what that is.

A. That is a memorandum of the meeting I have just referred to when the 18 or 20 fellows came in the office, which I dictated right after the meeting.

Q. I see.

Mr. Watkins: I offer this in evidence, Mr. Examiner, as Respondent's next in order. [887]

Trial Examiner Whittemore: Have you any objection?

Mr. Moore: I will object on the ground there is not sufficient foundation laid, anything for the record, as to that.

Trial Examiner Whittemore: If you want to ask questions on voir dire, go ahead. If you doubt the foundation, I am sure Mr. Watkins will not have any objection.

Voir Dire Examination

By Mr. Moore:

Q. Are you testifying from your memory, now, that those are the minutes you dictated?

A. Yes.

Q. Did you sign the original of these?

A. No, sir, there was never any signature put

(Testimony of Raymond S. Livingstone.)

on them; it was just a memorandum to keep for the future.

Mr. Watkins: Mr. Moore, may I interrupt long enough to say that this is like the other minutes we put in; they are a copy of the original document which is on file. Mr. Millman did assure me of that, and I think that is an exact copy.

Mr. Moore: Yes. The others, of course, were signed.

Mr. Watkins: That was a little different thing. Those were both—meetings in which they both participated.

Trial Examiner Whittemore: Have you a 1937 calendar?

Mr. Watkins: No, I haven't; mine goes back to 1938 is all.

Trial Examiner Whittemore: Do you have one, Mr. Moore? [888]

Mr. Moore: Well, the 1943 calendar is the same, so far as the days of the month are concerned.

Mr. Watkins: You are just examining him on voir dire, are you? Of course, I have some more questions I want to ask him.

Q. (By Mr. Moore): Where have these minutes been since you dictated them?

A. I don't know. I had a copy in Cleveland, ever since I returned.

Q. Was this copy made from records here?

A. I don't know where that copy came from.

Q. But you read this over and you will say

(Testimony of Raymond S. Livingstone.)

from your memory as it presently is that that's what you dictated?

A. There is one difference between this and the original. In the original this word is "distribute," a new word, I guess, to the girl I dictated to, and here it is "contribute." That is the right word, but in the original the word was "distribute."

Mr. Watkins: Mr. Hileman advises me there weren't any of those signed until they had the joint meeting.

Mr. Moore: I will object to it on the lack of foundation.

Q. (By Trial Examiner Whittemore): When did you make this?

A. Right after the meeting.

Q. The same day? A. Yes, sir. [889]

Q. I may be in error, but it is my recollection all the witnesses up to this document testified that meeting was held on the 27th. This is dated the 26th. Isn't that your recollection?

Mr. Watkins: I think a good many of them have.

Trial Examiner Whittemore: I don't recall anyone else testifying it was on a Monday, July 26th, the date of this, was Monday.

Mr. Watkins: I think, Mr. Examiner, there has been no great certainty as to the exact date of the meeting, except by Mr. Porter or Mr. Kangas.

Trial Examiner Whittemore: Is the original of this here?

Mr. Watkins: No, but we can have it here.

(Testimony of Raymond S. Livingstone.)

Trial Examiner Whittemore: I would like to see it.

Mr. Watkins: All right.

The Witness: May I be excused for a moment, Mr. Examiner?

Trial Examiner Whittemore: Yes.

(The witness leaves the stand.)

Mr. Watkins: Mr. Baldwin tells me he has a duplicate of it in his minutes, Mr. Examiner. May we go off the record?

Trial Examiner Whittemore: Surely. Off the record.

(A discussion off the record.)

Trial Examiner Whittemore: On the record.

Mr. Watkins: What does the Examiner wish to do? To reserve ruling on that until the original comes up here? [890] I haven't tried to examine the copy.

Trial Examiner Whittemore: I will receive it in evidence, but I assure you now that until there is some further explanation of it here I am not certain I shall accept this as proof on which you should rely that this meeting occurred July 26th, or that this is a correct set of minutes, or whatever they are called. "Minutes" here. I don't know of any minutes. This group of employees came in.

I don't know what it is all about, but I will permit it to be received. This witness says this is what he dictated, with the exception of one word.

The Witness: I said one word had been misprinted by the stenographer.

(Testimony of Raymond S. Livingstone.)

Trial Examiner Whittemore: This is the only document I am concerned with. I haven't seen the original. You said one word was changed in the original.

The Witness: Yes, that was right. The original is wrong.

Mr. Watkins: Mr. Examiner, I think under the circumstances, with Mr. Baldwin's permission, I would like to also introduce the copy of these minutes. I assume the copy is one that was in the files of the Alliance.

Trial Examiner Whittemore: How did they get in the Alliance's files?

Mr. Watkins: I don't know that. Mr. Baldwin can answer that. [891]

Mr. Baldwin: I don't know how they got there. I know they have always been there, because I looked over the minutes previously.

Trial Examiner Whittemore: You mean, so far as you know, they were in there when you took over as president?

Mr. Baldwin: Yes, sir.

Trial Examiner Whittemore: You took over as president long after this.

Mr. Baldwin: That is right; but I mean, since the time, I am pretty sure the minutes were in there, so I think Mr. Bebb could—well, of course that's another story. I believe he could tell us the facts.

Trial Examiner Whittemore: You don't know anything about them except they were in there when you took over?

(Testimony of Raymond S. Livingstone.)

Mr. Baldwin: I can vouch for the fact that they were in our set of minutes from the time I was president.

Trial Examiner Whittemore: I don't think that would help a great deal.

Mr. Moore: They are not exact copies in that they don't have a date at the top, the way the copy in evidence has.

Trial Examiner Whittemore: Is that right, Mr. Watkins?

Mr. Watkins: I hadn't compared them at all, Mr. Examiner. I know nothing about this.

Trial Examiner Whittemore: I understood your statement to be they had a copy of this. [892]

Mr. Watkins: The record is clear, Mr. Examiner. I think you misunderstood me.

Trial Examiner Whittemore: That is very possible.

Mr. Watkins: They had just told me they had a copy of this and I had not compared it at all.

Trial Examiner Whittemore: Suppose you compare the two. Perhaps you and Mr. Moore can do that together.

Mr. Watkins: This is a copy, Mr. Examiner, except for the date at the top; there is no date at the top.

Mr. Moore: It is in the same words. It very obviously is not an impression copy.

Mr. Watkins: No. I would like to offer this, also, in evidence at the same time, if you have no objection, Mr. Baldwin.

(Testimony of Raymond S. Livingstone.)

Mr. Baldwin: If it will help to clarify it I have no objection.

Mr. Watkins: May this be marked as Respondent's Exhibit 14.

(Whereupon, the document referred to was marked Respondent's Exhibit No. 14 for identification.)

Mr. Watkins: Is there any objection to that?

Mr. Moore: Yes. I will object on the same ground, as there is no showing where those minutes came from except they were among records which Mr. Baldwin took over in 1941, the latter part of 1941. They are unsigned. [893]

Trial Examiner Whittemore: You do not offer them for any more than that, do you?

Mr. Watkins: No, that is all.

Trial Examiner Whittemore: Well, I will receive 14.

(Whereupon, the document heretofore marked Respondent's Exhibit No. 14 for identification, was received in evidence.)

RESPONDENT'S EXHIBIT No. 14

Minutes of a meeting held between a group of employees and the Management of the Jadson Motor Products Company. On the morning of July 26, 1937 a group of employees of Jadson Motor Products Company asked for a meeting with the

(Testimony of Raymond S. Livingstone.)

Management which was held in Mr. Dachtler's office in the afternoon of this same day.

This committee stated that they were forming an independent union to represent them in their collective bargaining under the terms of the Wagner Act. The Management stated that under the terms of the Wagner Act they could not interfere with the formation or administration of any labor organizations or contribute financial support to it. The Committee stated that they understood such to be the case but were making their statement because they wanted to confer with the Management during working hours. They also stated what their demands would be in regards to wages, hours, and working conditions.

The Management stated that when their organization could show a majority of signatures of employees in the company, they would be in a position to negotiate with *the*, also that solicitation of members must be done outside of the plant and not during working hours. The committee then stated that when they had a majority of employees in their independent union, they would again ask for a meeting with the Management. The Management replied they would be willing and ready to confer with their representatives at any time.

There being no further business the meeting was adjourned.

Trial Examiner Whittemore: I want to see the original of 13 before I admit 13. I will hold that.

(Testimony of Raymond S. Livingstone.)

It is my understanding you have sent for the original.

Mr. Watkins: That is correct.

Trial Examiner Whittemore: So that we can compare the two.

Mr. Watkins: Yes.

Direct Examination
(Continued)

By Mr. Watkins:

Q. Mr. Livingstone, were you present at a meeting in which the Alliance, or independent union, came in and asked that it be recognized as the bargaining agent? A. Yes, sir.

Q. Can you state whether or not at that time any check was made of any signatures on applications which the Alliance submitted to the company?

A. Yes, sir.

Q. Who made the check?

A. I did, with Lyman Hodges. [894]

Q. What did you do in connection with it?

A. Well, we looked at each of the cards that had been submitted by the Alliance.

Q. They are cards which were submitted at that time?

A. Right. Then I asked Lyman about each name, whether he worked for the company. We also ascertained the number of eligible employees that were on the payroll at that time. From the number of cards that were submitted we found that the Alliance had a good majority. And, also, the

(Testimony of Raymond S. Livingstone.)

constitution, with a number of names on it, was shown to us. We looked at those names.

Q. Your check was made against cards that were shown to you? A. Yes.

Q. I show you Board's Exhibit 6 and will ask you whether or not you can recall that card as being the type of card, or the card being the card that was used when you made the check?

A. I can't remember definitely whether it was the card or whether it was not. It could have been and it could not have been.

Mr. Watkins: You may cross examine.

Mr. Moore: May we take a few minutes recess?

Trial Examiner Whittemore: Very well, if you wish. We will take two or three minutes recess. We just had one, you know. [895]

Mr. Moore: May we take another at this time?

(A short recess.)

Trial Examiner Whittemore: Proceed.

Cross Examination

By Mr. Moore:

Q. Mr. Livingstone, I show you Board's Exhibit 15 and I will ask you if Thompson Products, Inc., involved in the case in which that is the decision and order is the same as this respondent?

A. Yes, sir.

Q. Did you testify when the hearing was held in this matter? A. Yes, I did.

Q. That is the matter involved in Board's Exhibit 15. Are you the Raymond S. Livingstone who is mentioned in that decision and order?

(Testimony of Raymond S. Livingstone.)

A. Right.

Q. And in the findings of facts? A. Yes.

Mr. Moore: As I stated before that I would direct particular attention to a part of this decision and order, I will do that now.

I direct particular attention——

Mr. Watkins: Wait just a minute. Is this going to be part of the cross examination of the witness, Mr. Moore?

Mr. Moore: This is just a fulfillment of a promise I made earlier in the hearing. [896]

Mr. Watkins: Could we do that at the conclusion of the hearing as part of the argument?

Mr. Moore: We could, but we can do it now.

Mr. Watkins: My only thought is you were cross examining. If you want to go ahead with that, all right.

Mr. Moore: I will direct attention to Part "A" under Section 3 of the Board's finding of fact.

Trial Examiner Whittemore: All right.

Mr. Watkins: I might say, Mr. Examiner, that I want to object to counsel for the Board directing attention to any portion of this exhibit, because I believe it is incompetent, irrelevant and immaterial, and outside the issues in this case.

Trial Examiner Whittemore: All right. The objection is overruled. The document has been received, anyway.

The Witness: Just because I am interested, could I see what A-3 is?

(Testimony of Raymond S. Livingstone.)

Mr. Watkins: Surely.

(Witness reads document.)

Q. (By Mr. Watkins): Where were you employed before you were employed by Thompson Products?

A. I was employed by Thompson Products in 1929, and prior to that I worked for the "Cleveland Plain Dealer."

Q. Is that a newspaper?

A. Yes, sir. [897]

Q. Before that where did you work?

A. The steel mills.

Q. What steel mills?

A. Corrigan & McKinney.

Q. Where is that located? A. Cleveland.

Q. Before that where were you?

A. I was in school.

Q. The job at the steel mills was your first?

A. With the exception of numerous part time jobs in school.

Q. Does Thompson Products publish the Friendly Forum? A. It does.

Q. Is that published in your department?

A. Yes, sir.

Q. And is it published under your general supervision?

A. General guidance and direction, yes.

Q. Will you state what the use of that Friendly Forum is in the company's setup?

A. To disseminate any news of general information to employees.

(Testimony of Raymond S. Livingstone.)

Q. Any other purpose? A. No, sir.

Mr. Watkins: Just a moment——

The Witness: Except such benefits that may be derived from the dissemination of news. [898]

Mr. Watkins: Just a moment. I will object to this line of interrogation, Mr. Examiner, as not being proper cross examination. If counsel wants to take him for his own witness and question him, that is all right. But this is on matters definitely outside of the direct examination.

Mr. Moore: My purpose is to identify the Friendly Forum, for the purpose of asking questions on it.

Trial Examiner Whittemore: Well, I think, Mr. Watkins, you will know we don't hold to the principle of upholding cross examination to what was asked on direct. The matter is one of whether or not it is material. That is the only thing I am concerned about. What is this? Leading up to the introduction of some document to this witness?

Mr. Moore: Yes, it is.

Trial Examiner Whittemore: Go ahead.

Mr. Moore: I will ask this document be marked as Board's Exhibit 16 for identification.

Trial Examiner Whittemore: Have them marked 16-A, B and C.

(Whereupon, the documents referred to were marked Board's Exhibits 16-A, B and C for identification.)

Q. (By Mr. Moore) In publishing the Friendly Forum, do you get items you think will be of

(Testimony of Raymond S. Livingstone.)

interest to the employees and publish them in the Friendly Forum?

Mr. Watkins: Just a moment. May I have a running objec- [899] tion on the ground it is incompetent, irrelevant, and immaterial; outside the issues here and also outside of cross examination.

Trial Examiner Whittemore: You may have a standing exception. I will overrule your objection.

The Witness: We gather news, and other news is brought to us.

Q. (By Mr. Moore) You publish in here anything you want employees to see. Is that correct?

A. We publish anything we think is news of interest.

Q. I show you Board's Exhibit 16-A for identification, and ask you if that is a copy of the Friendly Forum? A. Yes, sir.

Trial Examiner Whittemore: Is there a date on it?

The Witness: May 29, 1941.

Q. (By Mr. Moore) Was that distributed in the Los Angeles plant of the respondent herein?

A. I think it was.

Q. Can you tell by examining it whether it was or not?

A. No, but it is my best belief it was.

Mr. Moore: I will offer this document in evidence.

Mr. Watkins: Do you mind if I see it?

Mr. Moore: Not at all.

(Testimony of Raymond S. Livingstone.)

Trial Examiner Whittemore: Have you offered all of these?

Mr. Moore: I believe I had offered 16-A. [900]

Trial Examiner Whittemore: Is there any objection to 16-A?

Mr. Watkins: Yes, our running objection to it also, Mr. Examiner.

Trial Examiner Whittemore: The objection is overruled. 16-A is received.

(Whereupon, the document heretofore marked Board's Exhibit 16-A for identification, was received in evidence.)

Friendly Forum

THE VOICE OF THE EMPLOYEES
Thompson Products, Inc.

(Printed in U. S. A.)

Vol. VIII, No. 6 | Cleveland—Detroit—St. Catharines—Los Angeles | May 29, 1941

West Coast's Wages Boosted

LOS ANGELES—Two weeks to out of two meetings between management and the representatives of the P. M. P. W. A., held in the space of four days, came agreements benefitting West Coast Plant hourly rate employees as follows

1—A blanket increase of five cents an hour, effective May 16, for all employees who had completed the probationary period with the company, including those eligible for automatic increases on May 15.

2—Agreement to schedule third shift workers from midnight to 7 A. M., with an lunch hour, and with pay for eight hours time. This on a temporary trial basis, to become effective with the first regular change of shift after the beginning of the first pay period after May 15.

3—Liberalization of the 1941 vacation plan for hourly rated employees to grant vacations of one-half week in all employees of from one to five years of company seniority. Details of this modification were posted on the bulletin boards.

In addition, out of the two meetings came further adjustments in individual job rates and in rates for some individual employees.

Good Work

While agreeing to the blanket five-cent an hour increase, management agreed with the P. M. P. W. A. that the cost of living was rising, but pointed out that increases in wages were greater than living cost increases. However, management stated that the wage increase was justified on the basis of the satisfactory work being performed.

(Continued on Page 6, Col. 8)

Holiday

All production operations will be suspended in Thompson Products Plants for Memorial Day, with the exception of aircraft operations in Cleveland's departments 8, 7, 6 and 20

Other Cleveland departments will close down from 7 A. M. Friday until 7 A. M. Saturday. Detroit will be closed from Thursday night until Monday morning, Toledo will be down completely on Friday, but will resume operations in several departments on Saturday. The West Coast Plant will be down from midnight Thursday night until midnight Friday night

Defense Emblems Prove Popular

National Defense Worker emblems, distributed to all United States plants of the company during the past few weeks, have won wide acceptance from employees, with only a small fraction of one per cent of all employees declining the opportunity voluntarily to sign pledge cards.

In Cleveland and Detroit the lapel pins were distributed in advance of the windshield stickers, but during the past week foremen and personnel officials were kept busy filling the demands by employees for the windshield decorations.

The windshield stickers are exact duplications in all but size of the lapel pins.

TENNIS TEAM

CLEVELAND — Main Plant's tennis team, which last year in its first year of competition tied for second place in the Cleveland Industrial Tennis League, was set to open play for the title this week. Strengthened over last year, the team expects to mop up.

Plants Operate at Peak Levels on Defense Work

Production for National Defense is keeping all Thompson Products divisions working at capacity, with employment moving upward in several units. In Detroit for instance, employment is now at the 1000 mark, highest ever with the exception of 1937

Interesting feature of the past month's activity was the placing in production of the first machinery of the Thompson Aircraft Products Company, in temporary quarters at the corner of Ashland Road and Cedar Ave. Some fifty men have already been assigned to this company in tool-making and production capacities, and more will be added steadily, while the new plant in Euclid, Ohio, is under construction

Week Progresses

Preliminary construction work on the new plant is moving steadily ahead with much ground work already completed.

West Coast's production schedules and employment both rose during May, and work progressed on the plant addition, which will approximately double the plant's floor space within the next few months.

More Expansion

Plant extension was being carried on at the St. Catherines plant, too, where production for Canada's Defense Program is already in high gear. Toledo Steel Products, also in the midst of an expansion program, is holding steadily to its capacity schedules.

Main Plant, operating at capacity for months, experienced no change in the rate of its operations, and its personnel continued to rise to constantly new record highs. More than 5400 people are now on Cleveland payrolls.

Crawford, Hileman Are West Coast Speakers

Los Angeles The entire personnel of the West Coast plant was on hand at the Marine Room of the Hilton Hotel, Long Beach, last Thursday night for the second annual banquet of the Old Guard Association, honoring employees of five or more years service with the company.

High lights of the evening were addresses by TP President F. C. Crawford, who made a special trip from Cleveland, and by Paul D. Hileman, plant general manager. Ray Livingstone, director of personnel, also spoke briefly.

five-year class, to three ten-year men and to four fifteen-year men. Unexpected award was the presentation of a bowling trophy to Paul Hileman, awarded that night to the championship bowling team

Save Pledge

In his remarks, Mr. Crawford contrasted world conditions of today with those a year ago, brought out the necessity for every American doing his part now and concluded by delivering the company's pledge. (Content of the pledge was reported in the April 4 Friendly Forum.)

Mr. Hileman opened his remarks by explaining the need of the plant expansion now being carried on at the West Coast, explained how the government stepped into the picture to make available money with which to purchase machinery to equip the new plant, and went on to lay special stress on the part each American must play in the Defense Program

He commented on the manner in which attitudes change and showed how the interest of Americans had [illegible] from that of ring-side spectators [illegible] people vitally concerned and involved in the drama [illegible] thinking leader [illegible] affairs in our nation is saying [illegible] work—all of [illegible] ever worked before to make our vast, democratic [illegible] They are saying something new everyday.

(Continued on Page 8, Col. 4)

Woda Appointed to New Position at Toledo Steel

CLEVELAND—Richard Woda, graduate last June of the first class of the Thompson Products Industrial Training Program, last Monday became an assistant to Walter Passino, Factory Manager of the Toledo Steel Products Company.

Richard Woda

Woda, a graduate of East Technical High School, is 24 years old and in his fourth year in the Industrial Training Program specialized in Dept. 7's work. Previously he had had much experience in plant lay-out work, under the direction of Jack Carson. His first duties in Toledo will have to do with plant lay-out problems.

[illegible]

Woda was married last [illegible] Edwards, who [illegible] to Toledo with [illegible] the Industrial Training [illegible] Program [illegible]

Catharine Lipscik Wins $100; Faints--- Then Buys Defense Bond With Money

CLEVELAND.—Catharine Lipsk, Main Plant matron, is a sturdy girl not given to fainting. So she was surprised two weeks ago Monday when she discovered herself being revived in the lobby of the Alhambra Theater.

As her head cleared she was able to remember the train of events which led in her dilemma. she could tell this story She is acquainted with the personnel at the Alhambra Theater, and on Monday night's she goes there, partly because there is Screeno contest, with cash awards

Good Luck

On this particular Monday she bought her ticket and asked that she be given a lucky number. The cashier wished her luck She entered the theater and the doorman wished her luck. She and the doorman and an usher all put their special sign on her ticket and she went in to her seat

Came the Screeno game, and the first number up was A-34 Catherine's number was A-33, so she thought that would be as close as she'd come. But, not so. A few minutes later her number came up and she had the opportunity to spin the hand on the dial which would indicate how much money she would win.

Fine Spinning

She gave it and extra long spin, saw the hand blur to a stop—at $100. Then she fainted.

She says she didn't celebrate the event with intoxicating liquors and any strangeness about her behavior the following day was due entirely to shock What she did do was pay off some bills and buy National Defense Bonds.

Apprentices Are Selected

CLEVELAND—Twelve new first year members of the Industrial Training Program were selected this week from 500 applicants who took the examination for entrance. Final selection was made from 40 students selected from the 500, while 375 of the 500 were recommended for Learner Training

Of the twelve selected two are present employees at Main Plant, Frank Dolnar, Dept. 8, and Frederick Adams, Dept 34. The others are Steve Coleman, East Tech; James Craig, West Tech; Raymond Ludwig, West Tech; Jack Sprow, East Tech; Henry W. Watson, Euclid Central; Thomas Popson, Collinwood, Ed Greiber, East Tech; Gerald West, Ashtabula High, Ashtabula, O.; Ed Gotovac, Collinwood, and John Rogos, Lakewood.

Call Goes Out Next Month for Canada's Third Victory War Loan

ST. CATHARINES.—Canada's third Victory War Loan, to raise funds to furnish "the tools to finish the job" will be launched in June, with an appeal being made to people in all income brackets.

Bonds in denominations from $50 upward will be issued, with arrangements possible through bankers and employers for all persons to suit the purchase of them to their individual budgets.

Sacrifice

It is being pointed out that ultimate victory must be England's and that attainment of that goal calls for sacrifices from everybody It is being stressed that on the shoulders of each individual rests the responsibility for the maintenance of peace and the preservation of free forms of government with all its privileges.

The question to be asked is not "Can I give?" but "How much can I give?" Any assurance of a future in which peace and security walk hand in hand, lies in the manner in which subscriptions are received for this new War Loan.

Investment

The War Loan is a fair and safe investment against the future. Aside from that viewpoint however, it is a necessity that embraces every Canadian as he goes peaceably and contentedly about his daily routine

"Let us face the challenge in that same indomitable spirit with which the people of Britain face their daily tasks in the front line of battle."

FRIENDLY FORUM

The Voice of the Employees

of

Thompson Products, Inc., Toledo Steel Products Co

Our creed—This publication, so long as it is in our charge, will never be used to promote the cause of any individual or group which is not to the best interests, fairly, of Thompson Products and Toledo Steel Products Employees. Nor will its columns be used to spread unfriendly gossip or excite prejudice. It will be devoted entirely to the advancement of those it is pledged to serve.

Cleveland

Olga Ponta (Dept 1), Harry Lorenz (Dept 1), Pete Horvath (Dept 6), Bessie Klein (Dept 11), Tony Cipiti (Dept 97), Don Tucker (Piston Plant), Louis Blasek (Piston Plant), Glenn Hulett (Dept 2), Larry Madge (Pin Plant), Ward Anspach (88).

EDITED BY MARK MULCAHY

Labor and National Defense

Labor, badly split within its own camp on matters of organization, since the start of the Nation's Defense Program has shown widely divergent attitudes toward the effort.

The C. I. O. has shown more contempt for Defense efforts than it has shown desire to co-operate, while the A. F. of L. has stated a desire to co-operate, but both have been militant in their efforts to prevent even the slighest curtailment of labor's rights, especially labor's right to strike.

Actually, very few people desire to see any curtailment of labor's rights or the loss of any of labor's gains. But, everyone with the nation's interests at heart is anxious to see the unstinted cooperative efforts of all parties build this country to its maximum protective strength.

People generally are not disposed to feel that minority interests should be permitted to thwart the national effort for defense. They feel there are ways short of strikes and work stoppages for labor to gain its justified ends. The A. F. of L. is inclined to agree with this line of thought and recommends "no strike" clauses in labor contracts. However, even these clauses are not always lived up to.

Under any and all circumstances the place of strikes in labor-management problems is only as a last resort. The right in strike is a right that should never be invoked before all other possible means of settlement have been exhausted. Especially in times such as the present, when every available man hour and machine hour of production is essential to the nation's safety, should the strike weapon be looked upon as a tool to be used only reluctantly, and as a very last resort—TO GAIN A JUSTIFIED END.

Labor's active acceptance of this viewpoint can do more to quell any anti-strike legislation than all the lobbying activity in the world. In labor's hands lies the answer as to whether they shall retain their gains and their rights—including their right to strike.

Suspicion, and proved charges in some instances, that strikes in Defense industries have been prompted by Communistic agitation is the biggest reason there is any sentiment for anti-labor legislation.

If labor will militantly combat all subversive influences in its ranks it can salvage for itself strong labor organizations, with which it can win respect and through which peaceful, constructive labor - management relationships might be developed.

The problem is for labor itself to solve. It is a problem that can be solved by the rank and file of the unions if they take to themselves the running of their unions; if they select carefully the men who are to lead them; if they analyze carefully the information leaders give them; if they weigh thoughtfully the premises on which are built their leader's arguments.

The rank and file of unions by exercising their rights and by exercising the same care in their selection of union officials as they are expected to exercise in their selection of public officials, can correct the abuses which have crept into unionism in recent years and can raise labor to a position of respect.

It is significant that members of unions are a substantial part of the same people who by the weight of their numbers control local and state and national elections. And in these there has never been more than a minimum of question concerning intention of right doing on the part of those elected.

More care is needed in the running of union matters—and more care should be taken in order to remove all trace of all "isms" from labor's leadership.

Wise and Otherwise

By Augusta Kunka

He has not learned the lesson of life who does not each day surmount a fear. Emerson

The great need today in every phase of our social economical and political life is understanding. It has always been so, but today the need is even greater. Charles R. Hook

We may not have as much to live on but we still have as much to live for.

It is the art of mankind to polish the world, and everyone who works is scrubbing some part. Thoreau

It is an idiot who thinks soldiers ever starve. It is women and children who die of starvation.—Herbert Hoover

To each is given a bag of tools
A shapeless mass and a book of rules.
And each must shape ere life has flown
A stumbling block or a stepping stone.

Hard play has killed many more men than hard work.

The way the will be ones strong is by doing small things you've made up your mind to do however much you don't want to do them at the time.

Financial security, soft living, plenty to eat, an easy chair, comfortable slippers, and a warm fire—these are enough to ruin any man.

Character is worth more than money. Character is worth more than anything else in the world. Dwight L. Moody

What do we live for if it is not to make life less difficult for each other. George Eliot

Our Flag

This year that grand old Flag of ours takes on new meaning. Wherever it flies it is an unmistakable symbol of freedom of thought, freedom of speech, and the right to worship God according to the dictates of one's own conscience. These are the things that men free men, live by. It is fitting that we pause for a moment to give thanks for America and for the great privilege of living under its flag.

Designed for the Ladies

By Ethel Leighton

The more you eat the more you want! And I don't mean Cracker Jack, I mean at picnics.

Even though you get dirty and tired, smeary and messy, uncomfortable from over-indulgence, yet, you'll do it everytime and enjoy it.

True while parking one's feet beside one's shoes under the family table you want your food well prepared, clean too, and properly seasoned right down to the last potato and served for convenience of easy and rapid consumption, but at a picnic, or roast, what if you do drop the rolls in the sand you just wipe them off and proceed with the help of ants and flies. At home perhaps you don't enjoy Cousin Laurie's company when he shares your hospitality at the dinner table, because of his not-too-dainty manners, but at a picnic you don't mind him. What if catsup drips merrily from an overstuffed bun, while still another associate displays a mustard complexion. It's all in a picnic.

Equalizer

Picnics are very democratic occasions too, great equalizers of mankind. It expects no more of Mrs. X (assuming X stands for excellent) than it does of Miss Y (young and inexperienced). If feasting at the home of Mrs. X, you'd naturally expect only the most delicious foods, prepared according to the prescribed health standards. But, at a picnic, what if she does serve slightly scorched dogs. She won't be lowered from the top of the pedestal she occupies in your opinion, to a bottom shelf, should you find a few inadvertantly placed ashes in the butter.—If you have any butter. You'll just pass it off with the same old remark, "Oh well, we all have to eat just so much dirt before we die."

If there's any drawback to picnics at all, it's getting ready for them trying to remember to pack everything you might really need. So, I would like to pass along a good idea suggested to me the other day. Keep a picnic box filled with the ever-necessary items, in the trunk of the car all ready and handy for use whether you should plan a picnic with deliberation, or should it be one of those spur-of-the-moment affairs. A suitable picnic box can be a tin cracker box, filled with some powdered substances for drinks, salt, pepper, and sugar in jars or shakers, evaporated milk, mustard, canned pork and beans, olives, potato strips or whatever your fancy chooses in the canned variety class, a can opener, paring knife, butcher knife, knives, forks and spoons, supply of paper napkins, plates, and cups, and an extra cloth or two. The tin box often comes in handy too for carrying or dipping water. And always, of course, there's enough room in the car for a sack of charcoal and those roasting forks. Then if you decide on a five-minute notice to have a picnic, it's easy to add the extras.

Blanket, Too

Another handy thing to keep in the trunk of the car is that old Indian Blanket, the one you never use, you know, because it's no object of beauty, an Indian would probably disown it (don't even know why it's called an Indian blanket). But it's just the thing to spread over that sandy spot or the place that's strewn over with pine needles, just the place you'd like to stop for your picnic. Just fold up the blanket and put it in a large shopping bag. It won't take up much room, and it certainly will come in handy.

And, as a final word, does anyone know what to do about mosquitos?

Safety News

DETROIT—An increasing number of injuries have been reported to the Michigan Plant Dispensary in the past several weeks, many of them old injuries suffered several weeks before the time they were reported.

Employees are constantly being reminded that for maximum protection against infection it is essential that even the smallest cut, scratch or bruise be immediately reported, so that prompt first aid treatment may check any infection.

Bar Shoes

Employees of Michigan Plant may now arrange to purchase shoes through Miss Purcell, day nurse in the Dispensary. Miss Purcell will furnish interested employees with all necessary details of the purchase plan.

Danger of over-filling stock pans and attempting to lift them alone was pointed out to employees last week. Pans never should be completely filled and no one employee should ever attempt to lift a loaded pan.

TRAFFIC SAFETY

Fair warning is served to the jaywalkers in Cleveland that the Police Department is about to use strict measures against the careless walkers attitude of "asking for an accident." Any driver will agree that enforcement is needed to curb the pedestrian who defies the traffic signals or steps into the path of traffic without care or concern.

A look at the traffic toll clearly shows the price the man on foot is paying for his carelessness. Of the fifty-one persons killed in traffic up to May 10th of this year thirty-nine were pedestrians. Twenty-six of these accident victims were responsible in part at least for the accident that claimed their lives.

Several were crossing against the traffic lights, some were jaywalking diagonally across the street and others took the fatal chance of stepping out from between parked cars.

The campaign for pedestrian protection will be prefaced by warnings and shortly followed by the issuance of arrest summons. Legislation now proposed will permit the person arrested to make payment of the fine in the same manner as parking tickets are handled.

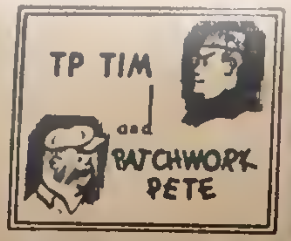
George Matowitz
Chief, Cleveland Police Dept.

Elected

LOS ANGELES—Representatives elected at the West Coast Plant's Old Guard party last Thursday night are I. E. Drake, V. Coeblij, S. W. Panttaja, G. F. Bywatec and C. O. Brockett.

Defense Courses

CLEVELAND—New courses in connection with the National Defense Program—courses in inspection, tool engineering and production supervision—were opened at Penn College this week. Although the courses were formally slated to begin on May 26, it was said at the college this week that vacancies still existed and that registrations would still be accepted.



West Coast's Old Guard Party Drew Crowd

Personals

West Coast

By Opal Jenkins

Albert Goulding, a polisher in the aircraft division, left May 18 for Illinois to spend a few days with his folks. Then he is Army bound, much to Eleanor Schmidt's desolation. One week they became engaged—the next week he is off to the Army. Ab has been with the company just six months, and says he hates to leave.

Seems as though the love bug has bitten again. Stanley Abbott has moved up from the second polisher seat to the first so he can keep an eye on Olive Olines.

Olivia Miller says she visited near Mt. Wilson on Sunday. Who's up there, Olivia? Is he tall, dark and handsome?

Grace Kitchens seems to have difficulty in keeping her car fenders straight. Saturday, while driving the boy friend's car, which had just been repainted, she mistook a stump of a small shrub and consequently wrecked the front fender. Another paint job. Oh! Gracie.

Tommy Hopper has been getting instructions the past week on the Rockwell from Lois Cox. The look he cast indicates not too much fondness for the position. He would rather be down at the old beach broadcasting his daily routine.

It has been arranged for all men working in the Inspection Department to alternate working night shift from now on; do you suppose Carl Franklin will survive?

Ida Mae Binyon says they can't run the dance at 108th and Broadway without her. She has been an every Saturday night patron for many months.

Now Dorothy Fought says "what could get you down quicker" than working Saturdays until noon, rush home, clean house and make for the city to buy a dress. Enough said.

The lunch man has added ice cream to his supplies. Very appetizing but fattening; if you don't believe it ask the writer.

Ladeen Gregg's little son, who attends military school; spent the week-end with his mother. He came home with a skinned nose—he should have nagged a rank, instead he nagged.

Linda Schumann says it must be love with Olive. She can't sleep nor eat—for thinking of him?

Come one, come all, LeRoy Knudtsen has hit high limit in bowling. Open for engagements.

By Pat Dunham

"In the spring a young man's fancy, etc." It so seems that a member of the Engineering Department, one Edwin Watson, has done more than think about love. We want to congratulate you, Ed, and our best wishes for a very happy marriage.

A red face and sunburned nose were the results of Bill Kearns' fishing trip at Big Bear. Trout and bass were victims of this fisherman's luck.

We want to congratulate Mr. Shedd on his excellent taste in choosing his assistants. Her name is Marcia McGaffin.

Gladys Mitchell, when asked on Monday if she had a nice week-end, could be heard giving a huge sigh and saying, "I had a very nice time rowing a boat at Orange County Park."

Elizabeth Johnson was said to have had a very nice time at the Romona Pageant.

We were very glad to see Evelyn Thorpe's bright smile among us. We missed her and are glad that she is well and back with us again.

We have several reports of Glenn Miller's appearance at the Palladium. Elizabeth Johnson, for one, said the floor was swell and the orchestra wonderful.

Scoop! We are happy to announce the marriage of "Scotty" Stewart and Georgie Sutton, of the Cost Department. We shall miss Georgie very much but wish them both a great deal of happiness.

We welcome the return of Hayes Schlundt to our organization. Hayes was with us several years ago and returned here from Douglas Aircraft to take over the duties of the Time Study and cost estimation.

Another new arrival is Edwin Schauer who is to be in charge of the new laboratory.

By Ernie Westhaver

According to a newspaper clipping on the bulletin board, "Red" Reddington, who was recently married, passed out at the altar. "Red" still claims that someone hit him on the head with a bat.

Ray Lang found a half pound of sawdust in his lunch pail one noon recently. We are wondering if perhaps some of the fellows in the shop know something about it.

We are glad to see Rene Simonin back to work in the Drafting Room after several months' illness.

"KB" Osborne is acquiring quite a tan as the result of week-ends at the beach.

Earl Worden reports an interesting incident regarding the Defense Fins which have been so enthusiastically received in this plant. It seems Earl was down at the harbor over the week-end and was all set in snap a picture of an old four-masted schooner when a cop came dashing up shouting, "What the blank-blank do you think you're doing?" and other choice words along that line. He spied the Defense Fin, looked at it closely and then says, "What was it you wanted to photograph, buddy?" Earl told him and he replied, "Well, you wait until that motorship loading airplanes casts off, and then go ahead."

Toledo

VITAL STATISTICS

Births

A son, Charles Thomas, was born to the Edmund Eisenbice's, Dept 2, on May 12.

A daughter was born to the Howard Miller's, Dept 13, on May 14.

Employees recently absent because of illness include Rita Ann O'Brien, who is recovering from an appendectomy at St Vincent's Hospital; Fred Wight, who returned to work on May 12, Harold Hager, who is recuperating at home following an operation, Clayton Costelle, who returned to work on May 19, Josie Peter, who returned to work on May 20, and Charles Stein, who returned on May 15.

New Employees recently hired include Ted Sowinski, Nicholas Lustic and C M Clark, in Dept 3, Ralph Shea, in Dept 3, Lucille Dibling and Zoleta Huber, in Dept 12, and Elwood Eber, watchman.

Marriages

Jack W. McCauley, Dept. 3, was married to Miss Dorothy Thompson, of Columbus, O., in Toledo, on Saturday, May 24.

By Evelyn Mayer

(Merchandising Division)

Has everyone met our new employees? They are Annabelle Brecht, Pauline Arend, Alouise Wenslawska, Bernice Mecle, Ralph Mowka, and Margaret Stuart.

Mary Fernoland and Marie Jaeck seem to have developed a fondness for college towns and the nearness of fraternity houses.

Things we can dream about: Our ball team winning just one game. Izzy's return.

It looks like the game of baseball is a little too rough for Hobe Brown. You fellows really should be a little more gentle.

Doesn't Alice Mugfor have some of the prettiest bouquets?

By Hermina Foster

There's a rumor of a new department being added to the Merchandising Div. Traffic Rules and Regulations Dept. Instructors—Angela Cannon and Herb Wertz. Tips on 1st lesson—1A. Never go through yellow OR red lights and you won't get stopped twice in one day—Angela. 1B. Always carry a rear-view mirror and you can see the cop sneaking up when you're doing 85 per.—Wertz.

Mary Greenich's new goggles add to her attractive appearance, but we can't figure out why she

Personals

a tan as the result of week-ends at the beach.

Earl Worden reports an interesting incident regarding the Defense Fins which have been so enthusiastically received in this plant. It seems Earl was down at the harbor over the week-end and was all set in snap a picture of an old four-masted schooner when a cop came dashing up shouting. "What the blank-blank do you think you're doing?" and other choice words along that line. He spied the Defense Fin, looked at it closely and then says, "What was it you wanted to photograph, buddy?" Earl told him and he replied, "Well, you wait until that motorship loading airplanes casts off, and then go ahead."

Toledo

VITAL STATISTICS

Births

A son, Charles Thomas, was born to the Edmund Eisenbice's, Dept 2, on May 12.

A daughter was born to the Howard Miller's, Dept 13, on May 14.

Employees recently absent because of illness include Rita Ann O'Brien, who is recovering from an appendectomy at St Vincent's Hospital; Fred Wight, who returned to work on May 12, Harold Hager, who is recuperating at home following an operation, Clayton Costelle, who returned to work on May 19, Josie Peter, who returned to work on May 20, and Charles Stein, who returned on May 15.

New Employees recently hired include Ted Sowinski, Nicholas Lustic and C M Clark, in Dept 3, Ralph Shea, in Dept 3, Lucille Dibling and Zoleta Huber, in Dept 12, and Elwood Eber, watchman.

Marriages

Jack W. McCauley, Dept. 3, was married to Miss Dorothy Thompson, of Columbus, O., in Toledo, on Saturday, May 24.

By Evelyn Mayer

(Merchandising Division)

Has everyone met our new employees? They are Annabelle Brecht, Pauline Arend, Alouise Wenslawska, Bernice Mecle, Ralph Mowka, and Margaret Stuart.

Mary Fernoland and Marie Jaeck seem to have developed a fondness for college towns and the nearness of fraternity houses.

Things we can dream about: Our ball team winning just one game. Izzy's return.

It looks like the game of baseball is a little too rough for Hobe Brown. You fellows really should be a little more gentle.

Doesn't Alice Mugfor have some of the prettiest bouquets?

By Hermina Foster

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Mary Greenich's new goggles add to her attractive appearance, but we can't figure out why she

Personals

cuns into buildings now—and in broad daylight, too

Ted's quick action saved his life the other day when he was almost trapped in the elevator door P S No reflection on the elevator operatur, entirely Ted's fault

Mary Fernelend—We're all trying to find ways in which to occupy your time when the boy friend returns to Camp Think we can succeed?

Ida is very proud of the "vase" she carries around which keeps her flowers fresh all day

Pauline says its hard walking nowadays since she is suffering from an infected toe Today she tried to subdue the pain by wearing house slippers (toe cut out) All jokes aside, Pauline we're all wishing you a very speedy recovery

For the last week, Paul Morris has had a problem to solve—"Oh, what shall I do with 800 snapout forms?" He's been trying to store them in every department on the 20th floor We heard he even tried "Chief Wahoo's" office.

The old game of "Hide and Seek" is becoming very popular here It goes like this—Ethel trying to run down Wertz—Woody on the watch for Paul—Paul hunting for shelf-spare and so on Don't give up, soon we'll all have our places and sun-shining faces too

By Florence Shirey

(Summit Street)

Since Mary Jane St. Charles took up horseback riding, it seems that she would rather stand up and work than sit down.

Marie Campbell is looking very happy these days since she moved into her new home at Point Place

They tell me Dorothy Hoppe was the "life of the party" the other night at Charlie Simons place

A very pretty sight to see is Mary Jane Burden up town shopping with her pretty little red headed niece

Since Rita Ann had her operation, she eats so much that we think she will need a larger chair when she gets back

Martha Madore looked very lovely in her new white formal at the dance the other night The line forms at the right boys

Did anyone ever notice all the girls Ray Magee has on Saturday noon? They even fight to see which one of them can sit beside him. Could it be that happy smile he always has?

By Carl Salo

Eddie Eisenbire is the proud father of a nice new baby boy Congratulations Eddie!

Did you know that George Gretzinger is the best Fish Dentist in the United States? Not so long ago he pulled a tooth out of a four-foot muskie

Anyone wishing to go with the boys Friday get in touch with Red Anderson

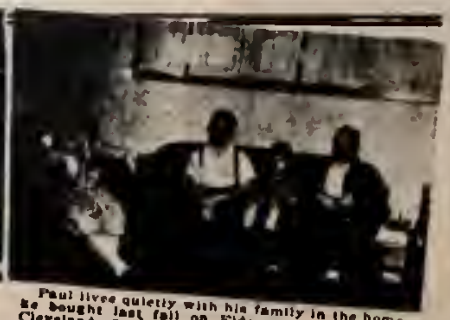
We see all glad to hear Harold Hager is rapidly recovering from his recent operation.

Freddy Piel is anxiously awaiting the time when he can go reef-fishing

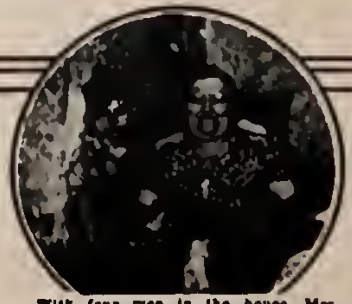
Andy Berg says the only thing he doesn't like about his new Buick is the two carburetors He is afraid that it will use twice as much gas.

Typically American . . . . The Paul Sopko's

Paul Sopko works in Cleveland's Dept. 3, where he operates a Cincinnati grinder.



Paul lives quietly with his family in the home he bought last fall on Elderwood Road, East Cleveland. Shown with him are his wife Rose, and sons Donald and Paul, Jr. His third son, Robert, is in Camp Lee, Va.



With four men in the house, Mrs. Sopko's sock problem is not a simple one. Donald lends his moral support while his mother darns.

Paul and Donald work in the vegetable garden, while Mrs. Sopko and Paul, Jr., watch them. Paul also has flowers and shrubs planted.

CLEVELAND.—From Europe to the United States in the 1890's came immigrants at the rate of 10,000 a week—more than a half million a year.

They came seeking opportunity, freedom, education and wealth.

Many came only to accumulate money—more plentiful here than anywhere else—and having accumulated it, returned to their native lands.

Others found the intricacies of the English language too confusing and gave up their adventure, returning also to their native lands.

But most of them found in the United States what they desired. So they learned the language and became citizens and remained to man the country's machines, manufacture its products, educate their children beyond any dream they could have had in European countries, elect the country's presidents, fight the country's wars, and finally, now, proudly send their sons off to join a new army.

Like Sopko

These are the people who readily understand what stake the United States has in the present world conflict. Three are the people like Paul Sopko, Cleveland's Dept. 3, who operates a Cincinnati grinder.

To Paul Sopko, America is the land of "milk and honey"—it has been since Christmas Day, 1899, when he arrived in New York with his mother and sister from Austria-Hungary, at the age of 11 years.

Although obviously too young to work the family farm near Vasarhell, in the central part of the country, when his father died in 1896, Paul had then completed all the schooling available to him in his home land Heavy taxes and the "must" of supporting the neighboring royalty made the idea of continuing the farm a futile one, so Paul and his mother and his sister headed for Philadelphia, where Paul's older, married sister lived

Paul's first employment, at the age of 11, was in a Philadelphia chair factory, where he sandpapered chairs for the handsome daily wage of fifty cents He went on to the Standard Oil's barrel factory, where he drove corks into the barrels for one dollar a day

Rivet Heater

Later he moved on to the Baldwin Locomotive Works, where he received $1 25 a day for heating rivets. Still later he returned to the barrel factory as a riveter at a rate of 22 cents an hour While on this job, the nine-hour day came into being, during the second term of President McKinley, and Paul, along with other workmen, thought the millenium had indeed arrived.

His next job took him to the mines at Johnstown, Pa., where he worked as a trackman, and where he futilely tried to salvage jewelry during the famous flood After a year, during which he saved his money, he returned to Philadelphia, to the Standard Oil's boiler works. He remained there until he was nearly eighteen years old and had saved $600

Sought Education

He then began to think of his education, and went to Freeland, Pa., where he could work in the Freeland Boiler Factory and attend night school at Mrs Babcock's. A year later he went to Hazelton to broaden his education at a day school, and supported himself by working as a custodian in a church and by running an elevator in a jewelry store.

After another year he arranged to enter the German Presbyterian School at Dubuque, Iowa, where he worked his way to a certificate supporting himself by waiting on table and washing dishes He started there in 1907 and finished in 1911. Although the lessons were taught in German, he attained a good working knowledge of English in conversation with other students

In 1911, Toledo University opened, and Paul moved on to Toledo, where he served as night clerk at the Y M C A and attended the University during the day Although he successfully completed his first year of study, he concluded that not even his zeal for education could compensate for the lack of sleep entailed

Farmed

He went back to Iowa, worked on a farm for four years and saved money In 1917 he came to Cleveland and got work at the Chandler Motor Car Co Later that year he married Miss Rose Palinkas He moved from job to job in several Cleveland manufacturing plants and in 1926 got a job as a grinder at Thumpson Products. Since that time his chief employment has been in Main Plant, and his current Old Guard listing gives him seven years and two months of unbroken seniority

The Sopko's have four sons Robert, 23, volunteered for Army service in March of this year, and now is stationed at Camp Lee, Va., in the Quartermaster's Training School. Robert attended Wooster College for two years, but had to give it up in 1938 when his father was seriously injured in an auto accident, and missed several months of work

The second son, Edward, was an honor graduate from Collinwood High last June and now is a supervisor at the Warner-Swasey Co. Paul, Jr., is in the eighth grade at Kirk Junior High School, and Donald is in 2A at Prospect School.

Contrast

All this is pretty wonderful to Paul Of Robert in the Army, he says "He gets $21 a month In Austria my father served fourteen years and got only seven cents a week" Paul himself was in the World War I American Army and was headed for New York when the Armistice was signed.

In Austria, he says, his children would have had no chance for an education, while he would have remained a farmer and struggled all his life just barely to beat off starvation

In place of the farm in Austria, the Sopko's have a trim home on Elderwood Road, East Cleveland, purchased last fall, and have a vegetable garden in the back yard. Paul has no car now, hasn't had since his accident in 1936. But previous to that he had one continuously from 1924. Now, his son, Edward, has one.

To Paul, who learned the preamble to the United States Constitution in his native tongue before he learned any English, America is still the promised land—the land of "milk and honey."

"I would rather have nothing and be here," says Paul, "than have a million dollars and be back in Europe."

Personals

Art Brown is the proud owner of a new movie camera He took it to Holland, Michigan and took pictures of the Tulip Festival.

By Eddie Zielinski

For a first class painting job see Florence Shirey, and "Ma" Laufkeller They can do a good job now that they are helping paint their house

After having the girls practicing for six weeks, Dorothy Raymond took a back seat and called the bowling match off with the men. She feels the girls don't stand a chance of beating them.

The members of Toledo Steel Products bowling league were the guests at a party given by the Management of the Company at the Hillcrest Hotel and everyone had a grand time

By Dorothy Raymond

Charles Hart, former employee of The Toledo Steel Products Co., has returned home on a ten day furlough He also has some new medals Two of them for pistol and rifle shooting Congratulations, Charles.

Our congratulations to Virginia Ebright on her twenty-first birthday, on May 20

By Ed Anderson

Where's the gang going Friday night this week? Ask Carl Salo, he knows

What happened to Louis DeSandro's new car? Several days after buying it, he started to drive an Old Ford to work Thumbs down on girl drivers.

Safety Shoes

TOLEDO — Safety shoes, manufactured by the International Shoe Co., of St Louis, may be purchased by employees directly from the factory, through arrangements recently made by the Personnel Office A representative of the factory visited the plant several weeks ago and measured for shoes all employees interested at that time. Employees who were not measured, but who know their shoe size, may order at any time and the shoes will be delivered to them at the factory.

League Play Opens With One Hitter

CLEVELAND —League competition for the Recreation Club's 1941 softball title got away to an auspicious start two weeks ago when Steve Celiga, Dept 6, hurled the Aircraft team to a no-hit 10 to 0 victory over the Sleeves and Pumps team from Dept 34

Steve Celiga

In all, 31 teams sprang into action th two leagues, one for second shift men and one for first and third shift men To date the two leagues have played a total of 62 games, and it is still too early to get an accurate line of the strength of any entry

Really Tough

Celiga's no hit effort, of course, is the stand-out feature to date He whiffed nine of the Dept. 34 team and allowed no balls to be hit out of the infield In addition he scored two runs himself, getting two hits, a home run and a single Steve is a hole-polisher in Dept 6, working at present on the fourth floor of the old power house building

Another feature of this game was Jake Novak's tremendous home run belt, which is said to have traveled more than 400 feet off his bat Jake has long carried a reputation for distance hitting Only two years ago did he give up ideas of playing professional ball and settle down at Main Plant In his ball playing days he won a name for himself in the Canadian-American League

Late Dance

Second Shift Workers Stage Own Club Party

CLEVELAND —First effort to solve its social problems by conducting individual dances for Club members on each shift was tried last Thursday night by the Recreation Club when it sponsored a dance for second shift employees at Sons of Italy Hall, on Euclid Avenue

Several hundred employees and their guests attended the dance, for which music was provided by Jack Horwitz and his orchestra The dance began after 11 P. M and continued until 3 A. M

Detroit Adds Equipment in Four Departments

DETROIT —A used Hamilton Shaper, costing $350, has been added to the D-3 equipment, while an Eklund milling, drilling and boring head attachment has been purchased for the Tool Room at a cost of $307

XA has a new Delta Drill Press for use in the manufacture of magnaligners. This cost $150 Two used Webster and Perks Tappers have been purchased for 1N Dept. at a cost of $780, and a Delta Drill press has also been added to the DN Dept.'s equipment.

Detroit O. G. Will Elect Next Week

DETROIT —Members of the Old Guard Association of the Michigan Plant next week will elect new class representatives for the year 1941, and later the chosen representatives will meet to elect officers

Election will be conducted by distributing ballots of the proper class to each member of the Association in the plant, and the members will be instructed to turn in the ballots to the Personnel Office

Last year's officers were Bill Goltz, president, Walter Bellman, vice president, Bill Fleming, treasurer; Wanda Wojtalas, financial secretary, and Helen Goner, recording secretary

St. Kits' Team Wins Pin Title

ST CATHARINES —With a driving uphill fight all the way in the final weeks and in the playoffs for the title, the Number 1 bowling team won the Carmichael Trophy, emblematic of the championship of the St Catharines Men's House B League

Finishing fourth in the "B" Section in the second half standings, the team knocked over in order the Warren Knits, the Bombers and the Imperials to rapture the second half flag

Tie It Up

Then in the final roll-off against the first half champs the Imperial Irons, TP dropped the first game by 140 pins, won the second by a scant eight, the third by only 38 leaving a 94 pin deficit going into the final game Then the team rolled, it banged away to clip the entire margin and throw the roll-off into a tie at the end of the regulation series In a sudden death added game TP grabbed the game decisively to win the Section B title and the Carmichael trophy

Members of the team are Jerry Heaton, manager, Bill Timmons, Earl Runcan, R Teale, Harry West and Doug Smith The cup was presented at the annual banquet in the Leonard Hotel

St. Kits Employees Earn Silver Seal

ST. CATHARINES —In recognition of the fact that St Catharines plant employees have cooperated by better than 90 per cent in the purchase of War Savings Certificates, the president of the War Savings Certificate Campaign this week sent the plant a special certificate bearing a silver seal

The silver seal indicates that employees are between 90 and 99 per cent regular in their purchase of the Certificates A gold seal is awarded for 100 per cent regularity

Some plants in the St. Catherines industrial area already have received their gold seals Thompson Products it is felt will not be far behind. Pledge cards may be secured in the Personnel Office.

Monday Wins One Hitter

TOLEDO —Behind the stellar pitching of Orie Monday the Toledo Valves, Toledo Steel Products' entry in the V. M. C. A. American Softball League, has rung up to wins in their first three starts

In their last game against the Textileather team the Valves copped a 3 to 2 decision, when Monday hurled hitless ball for six innings, and then allowed only a fruitless single in the seventh The Textileather's scored their runs earlier as the result of errors The Valves scored all of their runs in the fourth when a double, two singles and a walk combined with fielders choices gave them three counters

Orie Monday

Win Opener

In their opening game the Valves defeated the Sun Oils, 6 to 4, but they dropped their second start to the Owens-Illinois team, 10 to 4 Irving Sadowski was on the hill for the Valves in that game and was charged with the loss

The team is raffling off a radio and an electric toaster to raise funds to buy new uniforms The raffle will be held on June 13 and tickets are being sold for ten cents or three for a quarter All members of the team have tickets

Roster

Team members are Monday, Irving Sadowski Murphy, Joe Barbara, Red" Johnson, Stanley Sajdak, Louis Turda, John Simons Chester Zawadski Leo Bourda, Bill Esterly Walter Pawlinski Henry Toper, Anthony Stoper and Ed Flowkowski

Theta Sigma Phi Hold May Meeting

TOLEDO —The Theta Sigma Phi club members held their May meeting at the home of Hermina Foster

After adjournment of the business meeting, Ruth Devlin presented an interesting talk on critics views of a book entitled "I Knew Hitler" Members offered comments pro and con which proved both interesting and enlightening

Then followed a series of games with Ruth, Irene, and Ellen Miller prize winners Monica was Champ at the "Treasure Hunt"

The social events of the evening were concluded with a luncheon. The following were present Ethel Leighton, Monica Wagner, Naomi Benning, Ellen Miller, Edna Monroe, Ruth Ann Devlin, Angela Cannon, Hilda Burkhardt, Irene Smith, Hermina Foster, and Ellen Quilter as guest

We can all be angry with our neighbor What we want is to be shown, not his defects of which we are conscious, but his merits, to which we are too blind —Stevenson.

New Ball Team In St. Kits' Loop

ST CATHARINES —Although losing its first game of the season to the English Electric team, the new St Kits' team in the Intermediate Industrial Softball League promises to be a stand-out in its class.

Bolstered with some of the members from last year's Senior team the team shows much promise On it are "Squaker" Carr, Joe Currie, "Dick Tracy" Mackie, Jack Lowry, Brickhouse' Voyer "Ump" Lindo, Jimmy Ayer "Deacon" Reddick Minister' Jones "Shorty" Leonard 'Stroke Fitzpatrick, Don Lounsbury, Bill Armstrong and Frank Nunnemacher J Heaton is the team's manager and H Roberts its coach

Mueller Hurls Four Hit Game

DETROIT With Art Mueller speed ball pitcher living up to all advance predictions, the Michigan Plant's entry in the Detroit Industrial League has swept through its first four league games to lead the pack

Mueller started in high gear, shutting out the Hudson Motor team with four hits in the opening game and continuing the pace in the three succeeding games Tony Schroka has done an admirable job of catching Mueller's slants, while Mueller himself has done a helpful job of hitting

Jimmy Mitulski a new hitter who can play infield or outfield has been a valuable addition to the team Effective hitting has also been done by George Zielinski Ziggy Nowakowski and Leo Delano who is managing the team this year

New Room for Conferences Is Provided

DETROIT —New [illegible] water coolers have been placed in three of Michigan Plant's departments Experimental A-2 and 1N to provide employees with convenient locations at which to secure drinking water during [illegible] summer

The Wheel Aligner Dept has been moved from its old location behind the Personnel Office and located in PH Dept More space is provided, making it easier to manufacture the parts used in the magaligner Several new employees have been placed in the department to take care of the increased production demands

Conference Room

In the space formerly occupied by the Wheel Aligner Dept a Conference Room is being prepared lined with Celotex [illegible] make it virtually soundproof This will be used for [illegible] tions meetings and [illegible] ences in place of the [illegible] room in the Office Building

The receiving dock [illegible] enlarged to about two its original size, to care for the ever-increasing [illegible] ping resulting from the [illegible] production

As soon as a place for a new girls' washroom can be [illegible] the present girls' [illegible] Dept will be [illegible] men's use

Venetian [illegible] [illegible] to reduce the glare from the [illegible]

Doug McGinty Picked to Organize and Coordinate Foremen Training Program

CLEVELAND Recognizing the fact that many new supervisors will be required to properly man the Thompson Aircraft Products Company, and realizing that the task of upgrading present employees to these supervisory jobs will be a tremendous one the company announced this week that a continuous program of supervisory training would be inaugurated early next month

Doug McGinty

The program will be organized and coordinated by Doug McGinty, who comes to the company from the staff of Penn College, where he recently has been teaching courses in Foremanship, and where previously he taught engineering

Objectives

The program will be organized to accomplish three main objectives, to acquaint foremen and assistant foremen and supervisors with all company policies and procedures, to teach supervisory skills and to improve personality traits.

Objectives will be [illegible] means of lectures [illegible] and by visual aids [illegible] by use of Visa-[illegible] tions and [illegible] sonnel.

Biography

McGinty [illegible] was graduated [illegible] the [illegible] Miami School of Law 1941 been on the Penn College staff the past six years which he was Plant [illegible] neer for the Cleveland [illegible] the United States Rubber [illegible] has also worked on lake [illegible] at one time [illegible] Engineer's papers for [illegible] and Diesel engines

He is married [illegible] Shaker Heights Ohio

Funds Benefit

TOLEDO With the Men's [illegible] during Division of the campaign winning a special certificate [illegible] its 100 per cent contribution to the Community Fund in Toledo the company raised a total of $4[illegible]85 for the fund and at the same time raised $1380 00 for the Old Guard's Welfare Fund

Toledo Has Two Leagues

TOLEDO—Five day shift and three night shift teams have been banded into two softball leagues at the Toledo Steel Products Company In the only game played at press time Karpinski's team had won a 29 to 10 victory from Hoffman's team in a Nite League game

Noteworthy feature of the leagues is the fact many newer and younger employees have replaced the old standbys in the line-ups Hobe Brown, for instance, does not have a team in the league, although the Merchandising Div does have a team entered in a Downtown Office loop

Managers

Managers of the Day League teams are Ed Zielinski, Leo Bourda John Drath, Irving Sadowski and John Quinn. Nite League managers are Ed Hoffman, Burt Robison and Ted Karpinski

All games are played at Bay View Muny Park The Day Shift plays at 6 p m on Wednesday's, while the Nite Shift plays at 11 a m on Wednesday's.

Dinner Dance Is For Relief Fund

ST CATHARINES—An interesting event of May 2 was another of the enjoyable dinner dances sponsored by the Association, in the Crystal Room of the Welland Hotel, for the benefit of Air Raid victims in England The proceeds of the dance, $50, were presented to the Mayor of the City, who is in charge of the fund

A happy crowd of about 350 employees and their friends danced to the music of Rountree's orchestra, with whom the vocals were sung by TP's own diminutive songstress, Irene Dunn

Dinner was served in the dining room at 11 p m, after which dancing continued until 2 a m.

Toledoans Close Season at Party

TOLEDO—Members of the Toledo Steel Products bowling league polished off their season on May 17, at a Hillcrest Hotel party sponsored by the company Following dinner the bowlers, 80 in number, entertained themselves with available refreshments and by playing cards.

Special guest was Adam Karpinski, owner of the Elm Recreation, where the league bowled, who presented Leonard VanHaste, tool room, a special award for maintaining the highest average Grinders, season's champs, will receive a trophy, which had not been delivered at the time of the banquet.

No one can think of a man or woman as less strong because their heart was touched by the troubles and misfortunes of another One sign of greatness, and an unmistakable sign, is consideration and concern of others in times of joy and in times of sorrow—Exchange

New Personnel Supervisors

Sam Lassaro
Phone—353

George Malone
Phone—322

Nate Rogers
Phone—378

Questionnaires

With Local Draft Boards again becoming particularly active in the matter of sending out questionnaires, employees are reminded that it is imperative that they notify either their employment or personnel officials immediately upon receipt of their questionnaires Only five days are allowed from the time the questionnaires are received until they must be returned In order that requests for deferment may be prepared for those employees deemed essential to the continued efficient operation of departments, it is necessary that the full five days time be permitted officials in charge of preparing the deferment requests

Work Progresses On Toledo Plant

TOLEDO—All of the steel and much of the brick outside construction work on the addition to the Toledo Steel Products plant is now completed, and the entire structure is scheduled for completion by July 1.

First bricks were laid on May 6, and the work has progressed steadily since The old garage, which formerly faced the plant, has been moved to the extreme corner of the property, where in the future it will be used only as a storage shed.

O. G. Welfare Is Aiding Soldiers

ST CATHARINES—Despite the hustle and bustle of war time activity, the St Catharines Old Guard Association is not neglecting its welfare work With some 31 boys now in active service both at home and abroad, the Old Guard is kept busy regularly providing canned goods, cigarettes, candy and all other things which will help make a soldier's life more comfortable

Mrs Allcock, Mrs Leddicoat, Mrs Oakley, Mrs Patterson and Miss Crowe are knitting sweaters, socks and scarfs which are included in the parcels sent the soldiers

Tool Room Men Give Watch to Norm Clegg

CLEVELAND—Norm Clegg, recently named foreman in the TAPCO tool room was presented a fine wrist watch by the third shift men of TP's Dept 10 as a farewell gift In a letter presented with the watch the third shift said, "With your fine qualities and your ability to handle men we know you will always come out on top

"We, the boys of the Third Shift Tool Room take this opportunity to express our sincere gratitude and feeling with this small token, and may each ticking moment of this watch remind you of the 'gang on the Third Shift'."

Toledo's Dance, Picnic Are Set

TOLEDO—Summer social program for Toledo Steel Produces employees was announced last week On June 14 the Old Guard will sponsor a dance for the benefit of the Welfare Fund, and on Aug 2, the annual Old Guard picnic will be held at Cedar Point.

The dance on June 14 will be held in the Main Ballroom of the Commodore Perry Hotel Further details of the dance will be published on bulletin boards.

It was announced last week, that complete plans for the picnic have not been made, the trip to Cedar Point will probably be made on a train.

Michigan Plant Has Ball League

DETROIT—Michigan Plant's softball league, comprised of five teams of second shift workers, opened its season at Lodge Field on May 23 All games will be played at Lodge Field, at VanDyke and Georgia, on Tuesdays and Thursdays between the hours of 1 and 3 p m.

Some of the teams are now a man or two short of complete personnel because of transfers and any new second shift employees interested in playing should turn in their names to the Personnel Office

Teams Win

Two Golf Teams Stay to Fight for Press League Title

CLEVELAND.—Both of the Recreation Club's teams in the Press Industrial Golf League are still in the running. The No. 1 team has won two games after dropping its opener, and stands with two wins and a single loss. The No. 2 team dropped its first two games, but when faced with elimination last Saturday came through with a win to stay in the race.

West Coast O. G. Gets New Members

(Continued from Page 1)

that we must be bound by a common, unbreakable will to work together—to work in harmony, and gladly, for only in that manner can we achieve greatly, and produce enough to make us feel that our freedom is indeed strong

"They are calling America the "arsenal of Democracy." They are saying that every man within that arsenal has a job to do, and that each job is closely tied up with every other job in a common destiny, that what each man does directly affects the strength and weakness of every man.

Contagious

"I believe that I believe that should I shirk my job, I should influence someone else to shirk—and that one another—until my own indifference would spread with appalling swiftness to others, and others and others. It has long been known that attitudes are contagious, just as a smile or a frown is a thing that is catching As far as I'm concerned I don't intend that anyone will catch anything from me but eagerness to do a job, and to perform duties to the very utmost of ability."

Graduates

Graduates into the fifteen-year class were George Fickis, Carey Mathews, Sulo Panttaja and Roy Long, into the ten-year class Gene Higgins, Jim Ackerman and Corny Moretz, and into the five-year class, Glenn Beach, Harry Benham, Nad Clifford, Wilbur Edgell, Lloyd Galbraith, Otto Gumsler, Glenn Kincaid, Rudy Kohfeld, George McIntyre, Floyd Pfankuch, Louis Porter, Leonard Stamfil, Ted Weimer and R. F. Rucker.

St. Kits Wins Opening Game

ST. CATHARINES.—The plant's entry in the Senior Softball League opened its season with a 7 to 5 victory over the GM Macs, behind the fine hit pitching of Gord Derry. The Macs, last year's champs, were held in check by Derry, who showed much improved form over his early performances of a year ago

Strengthened by the addition of Joe Shugan, former hard ball player, and Bill Trojan, left fielder, each of whom collected three hits in the twelve-hit barrage off Phillips, reputed leading hurler in the league, TP showed unusual promise.

After being nicked for three runs in the early [illegible] settled down to shut out [illegible] for the last 4 frames, and his team mates finally clouted about Phillips' offerings to the late innings to drive home five runs in the final three innings.

Bright Hopes

Based on this performance hopes are running high that the team will again cop the cup that was theirs for the championship three years ago

Members of the team are R. Runcan, E. Nicowski, G Derry, J Egerroff, A. Upper, J McGrath, C. Preston, A. Dickinson, B Trojan, J. Maney, C Brunshaw, I Beets, G. Sandulac, B Hollowchuck and J. Shugan.

Training Offered Coast Employees

LOS ANGELES — Announcement was made on May 13 that the National Defense Training Office of Southern California had agreed to conduct a course in blueprints and mathematics for West Coast Plant employees, on condition that fifteen employees were interested.

At that time only thirteen employees had signed up for the course, and in seeking additional registrants it was pointed out that as beter jobs were opened up as a result of the expansion program they would be filled by the most capably qualified employees.

Wage Increase

(Continued from Page 1)

Management requested, however, that P. M. P W. A. officials keep the matter of scrap constantly before its membership and pointed out that while the scrap experience was improving it still looked bad, due to the increased percentage of aircraft work being performed and the higher scrap value of spoiled aircraft parts.

Management pointed out further that the actual earned average rate of employees compared favorably with other rates in the community. Specifically, it was pointed out that the average monthly overtime earnings amounted to $32.81 for each employee.

1206

(Testimony of Raymond S. Livingstone.)

Trial Examiner Whittemore: Have you offered the other two?

Mr. Moore: No. I haven't asked the witness about them as yet.

Q. (By Mr. Moore) Can you identify Board's Exhibit 16-B and 16-C?

A. Let's take "B." Now, I am not sure at all that "B" was distributed, for the reason that there is no Los Angeles news in it. This looks to me more like a Toledo edition, because of the personals in it, they are all Toledo personals, and there is absolutely no Los Angeles news on the first page.

Q. Did you bring in the newspapers with you when you came from Cleveland? A. No.

Q. Have any been sent from Cleveland?

A. Recently, you mean? Yes.

Q. What copies were sent from Cleveland since you have been [901] out here?

A. I don't know. Mr. Millman knows about that. It is possible there is confusion back in Cleveland, because we got a new editor in May, I think it was, and lost the editor that we had had ever since 1935. The new editor may not know the different editions.

Q. Referring to Board's Exhibit 16-C, do you know whether or not that was distributed in Los Angeles?

Mr. Watkins: May I state something off the record?

(Testimony of Raymond S. Livingstone.)

Trial Examiner Whittemore: Off the record.

(A discussion off the record.)

Trial Examiner Whittemore: On the record.

Mr. Watkins: Mr. Examiner, I understand we are trying through this witness to identify exhibits 16-A, B, and C, and determine whether or not they were delivered here in Los Angeles, and Mr. Hileman tells me they were. I am willing to stipulate under those circumstances that 16-A, B and C were delivered here in Los Angeles.

Trial Examiner Whittemore: And distributed here in Los Angeles?

Mr. Watkins: Yes, and distributed here in Los Angeles.

Trial Examiner Whittemore: To the employees in this local plant?

Mr. Watkins: To the employees in this plant.

Trial Examiner Whittemore: Is that correct, Mr. Hileman? [902]

Mr. Hileman: Yes, sir.

Trial Examiner Whittemore: All right. Is that satisfactory?

Mr. Moore: Yes.

Trial Examiner Whittemore: Then I will receive them in evidence, overruling your general objection.

Mr. Watkins: Before they are received, Mr. Examiner, I would like also to ask the purpose of them, because we have the entire document going

(Testimony of Raymond S. Livingstone.)

in with articles concerning various and sundry matters.

Trial Examiner Whittemore: I will go ahead and ask for the purpose, and if I am not satisfied, I will withdraw my ruling.

Mr. Watkins: And receive them only in part?

Trial Examiner Whittemore: That is right. You understand I have received them in evidence but he has asked me the purpose, and I think perhaps you should state the purpose. I might change the ruling, and again I might not.

Mr. Moore: My purpose is to show that through the editorials in Exhibits 16-A, and 16-B, and through the reprint of an address by Earl Harding in 16-C, the company was attempting to influence its employees in their union affiliations and activities.

Mr. Watkins: Mr. Examiner, on the basis of counsel's statement, I still wish to have my objection originally stated [903] remain in the record; but I do not object to them on the ground that they are introducing the whole document.

Trial Examiner Whittemore: The ruling will stand, then, and you have your exception.

(Whereupon, the documents heretofore marked Board's Exhibits 16-B and C for identification, were received in evidence.)

FRIENDLY FORUM

The Voice of the Employees

of

Thompson Products, Inc., Toledo Steel Products Co.

Our creed—This publication, so long as it is in our charge, will never be used to promote the cause of any individual or group which is not to the best interests, fairly, of Thompson Products and Toledo Steel Products Employees. Nor will its columns be used to spread unfriendly gossip or excite prejudice. It will be devoted entirely to the advancement of those it is pledged to serve.

Cleveland

Olga Feste (Dept. 1), Harry Lareau (Dept. 1), Pete Horvath (Dept. 3), Bessie Klein (Dept. 14), Tony Cipiti (Dept. 07), Don Tucker (Piston Plant), Louis Stasek (Piston Plant), Gene Ballist (Dept. 7), Larry Madge (Pin Plant), Ward Anspach (32)

Toledo

Anna Manzana (Dept. 12), Hobart Brown (Office), Johnnie Clement (Dept. 1), John Drath (Dept. 3), Florence Shirley (Dept. 13), Carl Sale (Dept. 7), and Robert Schmidt (Dept. 1).

EDITED BY MARK MULCAHY

No Time for Squabbles

In his addresses to the Old Guard Associations in Cleveland, Toledo and Detroit last month, F. C. Crawford said, "I doubt that America can afford time for petty squabbles in this time of emergency."

That seems a very sound observation, but one which is not generally recognized throughout the nation. Nearly 2,000,000 man-hours of labor have been lost through strikes, it has recently been estimated. Certainly this country has not progressed in preparation for defense to the point where the loss of these days of production is unimportant.

Every day of available labor is of the utmost importance now. If selfish interests don't soon learn that these are critical days, they may learn too late. They may learn after they no longer have any "rights" to exercise.

In these perilous times—and they are perilous—it not only is the duty of the government to make haste; nor only of management, nor only of any one group. It is a time for the whole nation—and every person in it to make haste.

Any person capable of contributing anything to the defense of his country, and who willfully withholds that contribution, is something less than an American.

AMERICA CAN'T AFFORD TIME FOR PETTY SQUABBLES IN THIS TIME OF EMERGENCY.

War Service Fund

It is well understood that the Canadian boys overseas rely on the folks back home. An appeal is now being sent out by the six leading Canadian War Service Funds—the Salvation Army, the Y. M. C. A., Canadian Legion, Knights of Columbus, and the Imperial Order Daughters of the Empire—for your assistance in helping brighten the days for the boys and at the same time help win the war.

YOUR assistance must come in the form of a donation. This donation will be included in the regular one per cent which is turned over to the Old Guard for distribution to the various agencies. This money is regularly turned over along with contributions from the company.

However, many employees have indicated a desire to contribute something in addition to this one per cent. Any such employees will find Mr. Dewar more than happy to accept their contributions and he will see to it that they reach the proper authorities.

Remember, this is one way Canadians can help the boys over there. They need our help. Don't fail them now. A failure now means failure to ourselves.

Designed for the Ladies

By Ethel Leighton

Ho-Hum! Spring fever again!

'Tis said, "In the spring time a young man's fancy gayly turns to thoughts of love." However, I don't believe it's an open and shut case. Springtime is just that particular time of year when no two souls think alike, and yet everyone has the same idea. It makes everyone ornery enough that he wants to be different, individual; and yet at the same time it makes us so agreeable, we want to please everyone about us. And so, typical of the season, we turn to thoughts of keeping up with the glory of spring, and everyone's fancy has the privilege of turning to whatever subject it chooses.

With the advent of spring there are lots of things to which a feminine mind can turn, and not always gayly at that. For example, our thoughts turn to housecleaning. The only really gay thing about that job is the mingled reaction of expectation, relief and satisfaction with a good job finally finished.

Then too, there are the little moths whose fancy gayly turns to thoughts of perforating our winter clothes, about to be placed within their reach.

And everytime you enter a store, and see that seed-rack, your fancy turns to visions of lovely flowers. But, maybe you'd better look over your left-over collection of seeds from last year, you know, the ones you received for two box tops and ten cents (to cover shipping and packing costs).

And, of course, in the spring the miss (or missus) with a thought to the future always let's her fancy turn to thoughts of lovely clothes—but they cost money (and what doesn't). Well, here's a suggestion. We've all laughed at the thought of buying a hat and getting a dress to match it. It sort of smacks of the "cart before the horse" idea, but good shoes, bags, and other necessary accessories are expensive items, and for that reason could well be the keynote, not the afterthought in planning a wardrobe.

So, why not buy the accessories first—something that will harmonize easily with other colors, and then choose your costume or costumes to go with the accessories. You'll have more possibilities for attractive as well as complete outfits, with more money left to spend on something else. (The point is, you see, not to have money left over, but how to get the most for your money.)

And just in case the temperature drops twenty or thirty degrees, and snow greets us instead of spring, and our fancy freezes—well—all I can add in the way of explanation is—APRIL FOOL.

Wise and Otherwise

By August Kanka

The time to adjust grievances is while they are small. The greatest undeveloped territory in the world lies under your hat.

"Some Things America Needs"

A realization that expediency, craftiness, artful dodging, compromise, and eager eye for the main chance and the spirit of "every man for himself" have played too great a part in American life.

A derision to give the hotfoot to sophistication, the rabbit punch to smart-alecksm, and the bum's rush to the belittlers of idealism, religion, and patriotism.

Elimination of "gimme-gimme" as the two most important words in English.

The reconstruction of moral fibre and personal courage to a point where it doesn't smell like something the cat dragged in as compared to the acts and works of the pioneers.

The immediate restoration of the Ten Commandments as a guide to living, and the return of the Bible to top place on all lists for preferred reading.

A realization that when your country is in danger, and part of your job is helping to meet it, the main question shouldn't be, "How much do I get, and will the hours be short?"—H. J. Phillips.

Liberty, correctly understood, is the right to choose between good things in order to develop the highest reaches of personality.

—F. J. Sheen

The Crooked Cross

Sure we know that he is crooked,
For he wears a crooked cross,
And he has it in his crooked mind
To be the crooked boss.

So, give your money freely,
And work with all your will,
And we'll give to Adolf Hitler
What we gave to "Kaiser Bill"

By ALEX CLELLAND

The Builders

I saw them tearing a building down—
A gang of men in a busy town.
With a ho, heave, ho and a lusty yell,
They swung a beam and a side-wall fell.

I asked the foreman, "Are these men skilled
As the men you would hire if you had to build?"
He laughed and said, "No, no, indeed,
Just common labor is all I need.
I can easily wreck in a day or two
What builders have taken a year to do."

So I asked myself as I went my way,
Which of these roles have I tried to play?
Am I a builder who works with care
Measuring life by the rule and square?
Or am I a wrecker who walks the town
Content with the labor of tearing down?

Seeholzer Says

By John A. Seeholzer

A head was placed on your shoulders when you were born. It was put there for you to use. Your shoulders are the foundation for that head and can be used to put against the wheel and make things go. In this crisis it is to your advantage to use that head to its full capacity. By using it you and your family will have a higher standard of living; your children can have a better education.

If you read the different letters that are circulated about your plant you will notice that some are very insulting and that means that the writers do not use their heads for your better conditions—but for only one purpose. That purpose is greed for the almighty dollar, to support a few leaders who do not like work. They prefer to be in the class of dictators.

I read one letter that came into our plant recently and it was full of common sense, and I believe it would lead us to a higher standard of living. A higher standard because under it we would work steadily, and after all steady work leads to a higher standard of living.

Use your head and don't let the other fellow put a ring in your nose and lead you to the slaughter.

In our defense program, it will be necessary for everybody from our President, Congress, Senate, State Representatives, to that powerful majority, the working man, to use their heads and put this thing over.

The Kaiser said Germany would rule the world, and it looks as though Hitler has the same idea. Now, if we all use our heads we can reverse that sentence of Europe and preserve our Democracy. We do not want to rule the world, but we would like to see all the world live in peace and all have a higher standard of living. In closing, I say, "Use your heads, boys, as it means everything to you and yours."

I want to thank that gang of mine for their loyalty and cooperation this month. It's been extraordinary, as there hasn't been one argument and they all pulled together no matter how tough the job was.

I certainly appreciate such cooperation, boys, and I will try to show my appreciation to you in the future, but don't think that you can lay down on the job and get away with it. If we all put one shoulder to the wheel every month as we did last month, it will mean a whole lot in this time of defense operation. We are all out to help our Uncle Sam and I know with such cooperation as you have shown this month we will do our share. Go to it, boys.

Yours truly,
John A. Seeholzer
Michigan Plant

Education does not mean teaching people to know what they do not know; it means teaching them to behave as they do not behave. It is not teaching the youths their shapes of letters, and the tricks of numbers, and then leaving them to turn their arithmetic in rogues, and their literature to lust.—Ruskin.

THE RIGHT TO WORK

Address before the Institute of Public Affairs, University of Virginia, *Charlottesville, Virginia*

By EARL HARDING

The temper of public opinion, if not our collective conscience and common sense, bids us concern ourselves more with the delays in procuring planes, tanks, guns and training to defend the America that is ours, and less with blueprints of a hoped-for future.

Blueprints, if drawn in historical perspective, will no doubt serve their purpose in good time. I appreciate the privilege of being an onlooker as architects of a better world offer their blueprints. But may I express the hope that public attention may be focused by this forum on uniting to save the present rather than dividing to plan the future.

For we have a heritage worth saving. And only by uniting to save it now can we insure our right to influence in the future the pattern of a free society which we hope to preserve.

The most valuable of all the freedoms we have to defend is our right to work. For the right to work is the right to live, the right to pursue happiness and garner its fruits.

What will freedom of speech avail if denial of the right to work deprives you of the right to earn the food that gives you the strength to speak?

What power will turn the wheels of a free press if the right to work in order to live is denied?

Protection of the right to work was wrested from King John by Magna Carta. It was won at the point of sword and spear, not reclaimers, as now by bayonets. It guaranteed that no man should be deprived of his means of livelihood. The tools of the worker were exempted from seizure by any process of law. And the decisions of English courts sustained that principle through the centuries and handed it down in the common law to become the foundation of our basic law.

In a free society the "right to work" means the right of the individual to make his own way where he can, by his own resourcefulness, industry and thrift, unmolested and unafraid.

As distorted by the corkscrew sophistries of Communism, Fascism and Nazism, the "right to work" means something entirely different. It means an assured place in the treadmill of the state. It means the "right" to a job, or to government relief, and to such sustenance as bureaucratic inefficiency sees fit to provide.

Not many Americans are interested in the Communist or the Fascist or the Nazi concept of the right to work—in slavery. Nevertheless, the American concept of the right to work has fallen to such low estate that the Army had to be called to its temporary and limited rescue.

But the Army has not restored to everyone everywhere to America his constitutional right to work. Public opinion will have to do that—by seeing to it that our constitutional right is re-implemented in a new labor law and by enforcement of laws long neglected. For the right of everyone to work, unmolested and without paying tribute, will continue to be denied until the American people recover their sanity and clear the obstruction at its source.

All that the Army did at North American Aviation, and all the United States Marines with bayonets and side-arms did a week later at Buffalo, was to stop interference with the right to work. Just a policeman's or a sheriff's job, the almost forgotten function of local self-government.

But it sounded simple and innocuous to some—this sending the Army to do what neglectful citizens have failed to do for themselves.

Necessary, under the circumstances? Yes, but a shameful necessity, and an alarming precedent, a step that everywhere has been the forerunner of centralized and eventually dictatorial government.

Only an uninformed, unsensitized public opinion would have tolerated conditions which created this disgraceful necessity. Only a bewildered, preoccupied alarmed public opinion will permit the precedent to become a fixture.

And that raises the question, how did we get this way? Why did it become necessary to end the United States Army to do the rightful job of local policemen, protecting citizens at their work and in their homes?

* * *

First, we permitted labor union organizers to be trained in Communist "labor colleges" not by educators but by agitators. We even paid expenses of such "students" to Russia for post-graduate courses in revolutionary technique.

Then we let Communists impregnate, in many instances dominate, the American labor movement. And, in the name of "academic freedom," we let their poison filter into our schools.

Tolerating this revolutionary philosophy, we have permitted goon squads of brass-knuckle men to slug our police, assault and terrorize workers, bomb their homes, appropriate our highways, seize property, drive police off the streets and usurp their functions, issue "passes" for public authorities to cross picket lines and for employers to enter their own plants, and even deny to the Federal government the right to cross picket lines to take possession of defense equipment which was the government's own property—all in the misused name of Labor—Mr. Valiant-for-Truth Pegler's "Labor-with-a-capital-L."

If anyone protested, if anyone suggested a housecleaning, he was smeared as a "reactionary," a "labor-hater," "strike-breaker," "Red-baiter," "patriotee," "stooge," or "hireling propaganda-monger."

Every recent poll of public opinion shows that these chickens are coming home to roost in steadily increasing numbers. It has dawned on the public, and let us hope on our legislative and executive departments—that the eggs whence came these defense-strike chickens were laid a long time ago.

* * *

Government was fostering and encouraging defense delays when the European war was starting.

On October 20, 1939, the Acting Secretary of the Navy, now Governor Charles Edison of New Jersey, wrote to the Chairman of the House Committee on Naval Affairs in response to an official inquiry. He stated that the Navy's request to cross the CIO picket line at the Bohn Aluminum Company's Detroit plant in order to remove patterns and castings belonging to the Government, had been refused. The strike lasted more than two months. Acting Secretary Edison wrote:

"The representatives of Union Local No. 208 were given full access to the files on the Navy contracts and they were informed that the delay in releasing patterns for delivery was seriously jeopardizing the manufacture of airplane engines at the Naval Aircraft Factory.

"At the end of the discussion, the Union representatives stated that their answer was emphatically 'No' and that they would not let patterns or inspected castings be removed. No further action was taken by the Navy Department to remove the patterns and castings."

Under whose government do we live? Obviously under a super-government of labor organizers and labor dictators.

And how did this super-government get its power? Mainly through the Wagner Act.

And who was responsible for the Wagner Act?

The public was led to believe that this law was the brain-child of Senator Wagner, and that its only purpose was to bring about industrial peace by securing to all workers the unmolested right to organize and bargain collectively through unions of their own free choice.

Industry agreed with this purpose. Industry generally had accepted the principle of collective bargaining long before the Wagner Act was proposed. The only question seriously open for argument was whether the bargainers should be employees themselves or an outside, dues-collecting, and often hostile organization imposed upon employees too often by coercion, intimidation, misrepresentation and physical force.

Furthermore, employers generally took the position that the closed shop, which organized labor sought to legalize, and did legalize by the Wagner Act, is a denial of the constitutional and inalienable right to work, and should not be imposed with the employer's assistance.

The Wagner Act had still another purpose—a concealed purpose. It was to eliminate competition from the labor organizing industry and create an air-tight monopoly protected by privately-sponsored law and exempt from public law.

This could be accomplished by legalizing the closed shop and setting up the machinery for eventually compelling every wage-earner to pay tribute to the monopoly or be denied his right to work and live.

Furthermore, the closed shop and its twin accomplice the check-off, would remove the element of risk from the business of labor organizing. And the overhead for dues collection would be loaded off on the carefree employer.

But some 40,000 competing labor groups stood in the way of this ideal. They were groups of workers in single plants, or in all the plants or businesses of a single company. They sought and usually obtained industrial peace by dealing directly with their employers, using their own collective bargaining procedure and avoiding the excessive fees which the outside organizers require to cover the overhead of Big Unionism.

To get rid of this competition it was necessary to give all labor groups not affiliated with the projected monopoly a bad name—"company union." Moscow's filthiest techniques were turned to this purpose. Every unaffiliated union, whether truly independent or "tainted" by employer influence, was branded for slaughter. On this point the record is clear.

The Executive Council of the American Federation of Labor, in its report to the 1938 convention at Houston, complained that the Wagner Act

"does not accomplish to the degree intended the outlawing of company unions. There must be in the revisions and amendments of the Act definite and more specific provisions in respect to the abolition of company unions."

This complaint was made in the face of solemn assurances of the Senate Committee which reported out and recommended passage of the Wagner Act, that—

"This bill does nothing to outlaw free and independent organizations of workers who by their own choice limit their cooperative activities to the limits of one company."

Elimination of employer-dominated unions was not enough to satisfy the back-stage authors of the Wagner Act. With the aid of a partisan Labor Board, they have carried on a war of extermination against all forms of independent unionism. The disclosures of the House Committee headed by Virginia's courageous Representative Howard Smith, show that the Wagner Act has been administered on the assumption that no independent labor organization has even a right to exist.

The Executive Council of the A. F. of L. also complained bitterly that the Labor Board has treated some of its unions no better than company unions. Apparently it matters whose ox is butchered.

But monopolistic intent was unconcealed. Speaking for the American Federation of Labor at the New York Herald-Tribune Forum in 1938, its General Counsel, Judge Joseph Padway, said:

"As President Green of the American Federation of Labor stated in Houston, before we can have anything like cooperation (between organized labor and industry) the question of union recognition and collective bargaining must be eliminated and that means that company unions, *WHETHER EMPLOYER-DOMINATED OR NOT*, have got to go."

What was this but a challenge to government, a demand that the constitutional guarantee that every citizen shall be protected in his right to work must not be enforced?

* * *

As to the authorship of the Labor Act, let Mr. William Green speak. In a signed article in Liberty Magazine, March 18, 1939, the President of the American Federation of Labor said of the Wagner Act:

"We helped write it. We thought of it as 'Our Baby.'"

This was long after the "House of Labor" had fallen in two. While Mr. Green and Mr. Lewis were still brethren laboring in the same vineyard, it was stated that Mr. Lewis also was consulted in the writing of "Labor's Magna Carta."

Be that as it may have been, Mr. Green was quoted as saying to a glass blowers convention in Atlantic City on July 11, 1938:

"The A. F. of L. is wholly and fully responsible for the enactment of the Wagner Labor Relations Act. We and Senator Wagner drafted it and supported it. No other movement can claim credit for its enactment, and no loud-mouthed representatives of a dual labor movement can claim any of the credit."

Regardless of claims for credit and indictments for discredit, oft-repeated has been the assertion that the Wagner Act was a labor organizer's act, not a workingman's act. And judged by the industrial strife it has created, it certainly was not an act in the public interest.

* * *

Public opinion samplings show a rising tide—a tide of protest by citizens and by members of organized labor as well, from the ranks of the 18 million organized and the 45 million unorganized—a tide rising so rapidly against defense obstructions and labor union lawlessness that the good as well as the bad in existing labor laws is likely to be swept away. That would not be in anybody's interest.

Nor is it in anybody's interest—excepting the enemies of our country—to have defense plants seized or any citizen's constitutional

(See Other Side)

al rights unnecessarily abridged to serve a national or a world emergency. So far as it is humanly possible we should keep our constitutional freedoms, surrendering them temporarily if we must, but making sure that we shall be able to recover them when the emergency is ended.

Temporarily the need is not seizure of defense plants *after* they have been blockaded but an immediate declaration of national policy that interference with the right to work will not be tolerated anywhere at any time.

Permanently and before we go into relying on the armed forces of the Federal government to protect the right to work, the need is for legislation to re-implement that right.

More than "cooling-off" periods we need a labor code just to workers fair to employers protective of the public interest that will forestall the temperatures from which "cooling-off" is necessary.

That will require acceptance of responsible restraints on the part of organized labor.

•

The ancient guilds in England circumscribed the right to work but their monopolies were broken by the advent of the machine age. Slowly the trades union movement supplanted the guilds, and collective bargaining came into use.

Collective bargaining does not mean in Britain as it does in the United States hurling the combined economic and often physical force of many unions against one employer by direct and sympathetic strike, mass picketing, violence and national boycotts. Collective bargaining in Britain is *bargaining* not coercion. Under reasonable legal restraints, it is conducted so that it means the *balancing* of economic forces—on the one side strong trades unions controlling an entire industry; on the other, equally extensive trade associations of employers.

The last attempt at coercive methods by British trades unions was the general strike of 1926. It quickly met its Waterloo in an uprising of public opinion that forced Parliament to pass the Trades Disputes Act of 1927.

But every suggestion that restrictive legislation comparable to the British Trades Disputes Act is needed in the United States has been met with howls of apprehension, not unmingled with abuse.

• • •

Anti-trust laws did not destroy desirable business, nor will reasonable restraints destroy desirable labor unions.

Nevertheless, wish for it as we may voluntary reformation of the American labor movement does not appear to be lurking around any corner. Enforcement of the Wagner Act by zealots of unionism has only intensified demands for closed shop monopolies. Before the Wagner Act it was argued that the closed shop was essential to preservation of unions. That argument is nullified now, the most antagonistic employer cannot discriminate because of union membership.

But a union is free to coerce the employer into firing the worker if he refuses to join or pay his tribute. The union is free to harass the employee at his work. It can and does hound him, his wife and his children at home, at school at play, until he falls in line and pays for his right to work.

The categories of union terrorism defy the Devil to produce an equal. If you doubt this come to know factory workers as I know them, become their friend as I have had the privilege of making many of them my friends; get the victims of union terrorism to tell you behind closed doors what they dare not say in public. Then you will learn what abridgement of the right to work has come to mean in this free land. And you will come irresistibly to the conclusion that *unless you protect the right to work, you will in time lose all your other rights.* History shows no long-sustained exception to this rule.

You will then see the wisdom of demanding enactment of a labor code—not "after the war" but now—

Defining legal and illegal strikes, protecting the right to strike or not to strike, the right to join or not to join a union, the right to bargain for oneself or to bargain collectively:

Requiring labor organizers to be licensed and to be American citizens without criminal records.

Requiring labor organizations to be registered, to publish their constitutions and by-laws, to account publicly for their funds, to use of their funds for political purposes and prohibiting any interference whatsoever with the right to work.

You will see the absolute necessity for outlawing mass picketing and strikes designed to coerce government by inflicting hardship on the community, and labor union practices that set up trade barriers, create monopolies and generally work against the public welfare.

Learn what are the back-room methods of unbridled law-defying union organizers—the higher-up who incite strikers to riot and proclaim in their "pep-talks" that they never knew a strike to be won without violence.

Discover for yourself methods for marking strike ballots in advance and stuffing the returns to insure calling a strike where no strike is wanted, and the procedure in racket-ridden unions for denying secrecy of ballot and freedom of speech.

Then you will see that the ultimate good of all labor organizations demands the laying down of lawful procedure for calling strikes—that the just may not suffer from the wrong-doing of the unjust.

You will discover the reasonableness and the necessity for requiring written complaints and written answers to be made by employees and employer in any labor dispute which may lead to a strike, and then free discussion of the issues by employee and employer representatives in the presence of all whose jobs would be affected by a strike. Then the workers would know what they were striking about.

Only after such full and free discussion should a strike vote be permitted and then by supervised secret ballot. Strikes called in avoidance of such procedure should be outlaw strikes, and those inciting or participating in them should lose the protection accorded by law to lawful strikes.

This would not prohibit striking. It would not prevent any worker quitting his job. It would not mean "forced labor." But it would be a brake on the hot-head agitator, the apostle of the class struggle, the twister of facts and the fabricator of grievances. It would bring employee and employer face to face in avoid trouble, not to settle it after trial by combat had failed.

Require truthfulness in labor [illegible] as it is required by [illegible] in selling real estate and securities. Write into a labor relations act the requirement that the rank and file worker must hear both sides of a labor dispute, honestly told him, before he can vote to strike. He will, in the long run, come to a fair decision if he knows all the facts.

This would not hurt any honestly organized and conducted union.

Nor would any desirable union be hurt by outlawing interference with the right to work.

• • •

Whatever may be your interests, your background and your viewpoint, weigh and consider the value of maintaining this fundamental right.

Surrender it to no man, no group of men, no government.

Fight for it, if necessary. No other freedom is more precious.

This underlying principle of liberty has never been stated with greater clarity than by a Presidential Commission* appointed by Theodore Roosevelt. It is a declaration for all people who would be free.

"The right to remain at work where others have ceased to work, or to engage anew in work which others have abandoned, is part of the *personal liberty* of a citizen that can never be surrendered, and every infringement thereof merits and should receive the stern denouncement of the law.

"All this seems too plain for argument. Common sense and common law alike denounce the conduct of those who interfere with this fundamental right of the citizen.

"The assertion of the right seems trite and commonplace, but that land is blessed where the maxims of liberty are commonplace."

*Anthracite Coal Strike Commission, 1902, Report pp. 75-6.

Meet 'Em---They're New

By Rosemary Kuhn
(With the help of Bob Roth and Joe Kozsey)

Rookies the older men call them and say they are two weeks or three months old during their age by seniority rather than by years. Since August 1 nearly 900 rookies have been hired to help fill the demand for more and more TP aircraft and automotive parts.

Here are a few typical new employees from all over the plant.

Manny Rakins, 25-188, says a factory job [illegible] real work like the old days when [illegible] was boxing [illegible] was the center of Roberts Athletic Club at 55th and Lexington. He's been trained by Al Soghin at the Arena for several years, [illegible] and has three Golden Gloves Trainer Trophies. Married, he has a two-year-old boy whom he [illegible] Lil Boxing.

Harry Singerman, 08-80, [illegible] proud [illegible] job moving equipment [illegible] He came here August 18 from a job moving equipment [illegible] fan he likes the [illegible] ride and [illegible] for the [illegible] Ohio.

Rose Perrille, 30-700, worked in a canning factory before starting work here August 10. Now she operates a drill press, and says she likes the work fine. Canning made her nervous. An invalid father takes most of her spare time, but she loves dancing and sports when she can do them.

John Kochick, 10-18, went into the Thompson tool room August 11. He's running a grinding machine now but expects to be put on a miller which cuts dies and does odd work a lathe can't do. Airplane models are his hobby. He often designs his own and specializes in enemy aircraft. Originally at the Ohio Tool Company, he came here to learn a trade.

Helen Serett, 07-022, started work as a filing clerk in department 87 August 27. But she can't be strictly classed as new, having worked here in 1934 making valve heads. More recently she was a waitress on White [illegible] girls doing the [illegible] work she enjoys being back in the factory.

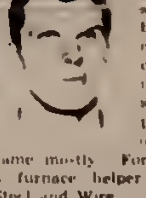
Johnny Hunt, 08-145, came here August 12 and [illegible] a tool polisher. He took this job to better himself, and likes the work. [illegible] grinding fumes [illegible] department. Though he enjoys baseball and football, he doesn't think much of either the Rams or the Indians. He's married and has one girl, Judith Ann, 4½.

Peter Weiss, 26-58, the new evening shift clock man, was formerly with the State Highway Patrol but quit to get married five months ago. His unusual hobby is buying puppies at the dog pound, training them to obey and he down and then giving them to his friends. Ten puppies have found homes this way.

Adolph Treichel, 20-256, used to be a cook at Clarks restaurant. Now while he's working he's as black as he was while there for he is in the noisiest, hottest department in the factory. His very important hobby, which takes most of his extra time, is his fiancee.

In the same department is **Fred Tschaisky**, 20-281, who started work August 23. He's a furnace feeder and likes his work a lot. Most of his spare time is spent at home helping his wife for they've three children, a boy and a girl who are eight and seven and a 22-month old baby girl, Karen Lee.

Ralph Lewis, 33-280, was a secretary for industrial companies in this section of Ohio until he decided to throw it all up and go into shop work. Though he couldn't get used to standing up at first, he likes this type of work "so much better." He's a learner on a Cincinnati grinder.



Alex Kasnias, 12-178, came to gust 14. Quite a hunter and trapper in his spare time, he's bagged a good many mink. He doesn't bother much with deer, shoots rabbits, pheasants, and other small game mostly. Formerly he was a furnace helper at American Steel and Wire.

Don O'Brian, 03-365, another one of the Irishmen who swarm over the plant, runs a drill press. He's interested in aviation and wants to take flying lessons next [illegible]. When he was in Cleveland Heights High School he ran a regular gossip column and likes [illegible] side.

Arthur Dohbrodt, a tungsten carbide tool expert from General Electric is an outside man who got caught in this interviewing tour and is taking the consequences. More often he takes such consequences as Thistle Down gives out. As a result he says his hobby is "feeding the horses."

Lawson Deming, 18-275, a broadcaster for 10 years has a time getting used to the bustling and noise here after the absolute silence of radio. Working on the second shift, he inspects aircraft valves and in addition broad[illegible] casts each morning over WGAR on a commercial food program with his wife. A one-year-old boy completes the family.

Ralph Kelbaugh, 07-658, just finished his 30-day period on a center grinding machine. He admits he's just a farm boy who didn't know what a grinder looked like until he came here but he's very interested in the work. Though he's had two years in Bowling Green State University and hopes to finish his course some day, he likes the feel of accomplishing things in his present job.

This feature will be continued in future issues.

(Testimony of Raymond S. Livingstone.)

Q. (By Mr. Moore) What did you say was the purpose of your second visit to Los Angeles?

A. To put in a set of personnel records, generally bring the personnel procedure in the Los Angeles plant into conformity with what we had in the other plants, also to help in the installation of a wage incentive system; when I said "personnel practices" I mean first aid activities, employment, all the things that are generally grouped under the field of personnel administration.

Q. Did you decide during the time you were here to let Mr. Dachtler go?

A. Did I decide?

Q. Yes. A. I didn't decide it, no.

Q. Was it decided during the time you were here, to let him go?

A. It was, at least I was notified while I was here that he was to be let go. [904]

Q. Did Mr. Hileman take his place in the plant?

A. Yes, sir.

Q. When did Mr. Dachtler leave?

A. I don't know exactly. He had some duties in connection with the operations for about a month after Mr. Hileman took charge, although all of Mr. Dachtler's activities were under Mr. Hileman's direction.

Q. With respect to this meeting at Uncle Gabriel's at which you had dinner, what was the date of that? A. I don't know.

Q. As nearly as you can recall.

(Testimony of Raymond S. Livingstone.)

A. It was the latter part of the week of July 26, 1937.

Q. Was it before or after this group of employees had come into your office?

A. After, because some of the foremen wanted to go to the union meeting that the independents were calling, and that's what caused us to get them together out at this tavern, or eating place.

Q. You think it was about a week after the employees came into the office?

A. I couldn't be sure, but it is my impression it was during the same week.

Q. At that dinner you said there was no speech, as such, made? A. No, sir. [905]

Q. Is that right? A. No.

Q. You mean by that that no one stood up and spoke?

A. No. And there was nothing formal about it in the way of an address at all. It was simply where a group of us had dinner together and we sat around and visited informally, talking about the shop, we talked about Cleveland, we talked about Thompson Products, we asked questions, gave experiences, and I think the meeting was over quite early in the evening.

Q. Was there anything said there that would indicate that management would prefer to have a union of their own employees, rather than an outside union? A. I think so.

Q. What was that?

A. I drew a comparison between conditions in

(Testimony of Raymond S. Livingstone.)

the Detroit plant under the C. I. O., and conditions in the Cleveland plant under independent bargaining, but while I expressed a preference to the independent unionism, I, at the same time, warned them that our feelings in it could have nothing at all to do with what the employees picked; that the foremen were to let that situation alone.

Q. Did you indicate your preference? Did you say you preferred a union of the company's employees only?

A. I didn't get the last part of your question. (The question was read.) [906]

The Witness: No, I didn't say that I preferred a union specifically.

Q. (By Mr. Moore) Did Mr. Dachtler ever visit you at the Jonathan Club?

A. Yes, many times.

Q. On a number of occasions?

A. Yes, sir.

Q. Do you know how the name: Pacific Motor Parts Workers Alliance came to be chosen for the Alliance that was formed here? A. No, sir.

Q. Do you know any facts that would indicate to you why there is a similarity between that name and the name of the Alliance in Cleveland?

A. I didn't know it was similar.

Q. What is the name of the Alliance in Cleveland? A. Which plant?

Q. I am referring to the Alliance that was involved in the Board case, the decision on which you examined.

(Testimony of Raymond S. Livingstone.)

A. Well, that is extinct now, but the name was: Automotive and Aircraft Workers Alliance, Inc.

Q. You know of no facts that would indicate a reason for the similarity in names?

A. Well, I would just be guessing, but some of the people did ask me what the name of the Cleveland union was, just as [907] you have here and I told them.

Q. Some of the people where?

A. In the plant.

Q. Some of the employees? A. Yes.

Q. Did you have discussions with them about the union in the plant at Cleveland?

A. They asked me whether we had C. I. O. in Cleveland, what we had in Detroit, and I told them.

Q. Who asked you that?

A. I can't remember anybody's name who did it.

Q. Did that happen while you were walking through the plant, among the men?

A. Yes. Yes.

Q. Now, referring to this meeting at which a group of employees came in to see you, was there only one such meeting before the Alliance asked for bargaining rights?

A. Well, they asked for bargaining rights at the first meeting.

Q. They asked for bargaining rights?

A. Yes, they came in to be recognized, and we told them no, we wouldn't recognize any union

(Testimony of Raymond S. Livingstone.)

unless it had a majority; we said you have got to go out and get 51 per cent or better.

Trial Examiner Whittemore: Off the record.

(A discussion off the record.) [908]

Trial Examiner Whittemore: On the record.

Mr. Watkins: We will stipulate that Respondent's Exhibit 13-A is the original sent for by the Trial Examiner.

Mr. Moore: That is satisfactory.

(Whereupon, the document referred to was marked Respondent's Exhibit 13-A for identification.)

Q. (By Mr. Moore) Now, Respondent's Exhibit 13-A, I will ask you how long after that meeting you dictated the minutes?

A. Probably an hour afterwards.

Q. Had the men, when they came in to you, formed a union?

A. I couldn't say as to that.

Q. What circumstances about that meeting made you start out with the word "Minutes?"

A. Probably the practice of writing minutes in Cleveland, or minutes of that type, whether they were meetings of the Old Guard Association or the recreation group, or minutes of employees association meetings, which is just a practice that I acquired over a period of years.

Q. Were there any minutes——

Mr. Watkins: May we have a recess for just one second, please?

(Testimony of Raymond S. Livingstone.)

Trial Examiner Whittemore: All right.

(A short recess.)

Mr. Watkins: There is a second page to that exhibit.

Trial Examiner Whittemore: Go ahead. [909]

Q. (By Mr. Moore) Were there any minutes dictated by you or by anyone else after this meeting of foremen at Uncle Gabriel's?

A. No, sir.

Q. Why not?

A. There just wasn't any reason for it.

Q. You didn't consider it of sufficient importance to have minutes written?

A. Not of that meeting, no.

Q. Why did you consider the meeting at which these employees came in more important than that meeting?

A. Well, one was a meeting among members of the management; the other was a meeting between management and the group of employees who were demanding bargaining rights, at a time when I knew the C. I. O. was also interested in bargaining rights. So, I wanted an exact record of just what these men were told in the event there would later be any question as to the propriety of our action.

Q. Do you know who put the date on Respondent's Exhibit 13-A? A. No, sir.

Q. Did you do it? A. No, sir.

(Testimony of Raymond S. Livingstone.)

Q. Who crossed out the "dis" on "distribute" in 13-A and wrote in "con" above it?

A. I don't know. [910]

Q. Do you know when it was done?

A. No, but I know it was done a long, long time ago, because I have the carbon copy of Exhibit 13-A in my bag now. I brought it with me from Cleveland, and it has been in the Los Angeles file, and in Cleveland for a long time.

Trial Examiner Whittemore: While you are on that point, will you ask when the ink notation as to the date was put on.

Q. (By Mr. Moore) Do you know when the ink notation of the date was put on?

A. No, sir. I don't know anything about it.

Q. You think it was not there at the time you—I assume you read it over after you dictated it?

A. Yes.

Q. The date was not there at the time you read it over?

A. I don't know; I couldn't recall.

Q. Examine Respondent's Exhibit 14 and Respondent's Exhibit 13-A; would you say that the date was on it at the time you read it over, or that it was not?

A. I wouldn't guess on it. I just don't know.

Q. You don't know. How many meetings between the Alliance and the management did you attend, altogether, during 1937?

A. I attended three, if I recall correctly. One of them was the first meeting where the group

(Testimony of Raymond S. Livingstone.)

came in and demanded recognition; the second one was the meeting at which they presented their majority, and then began the discussion of the [911] things that they wanted to negotiate about; the third one was a continuation of that second meeting, and it was a few days later when we negotiated a wage scale, if I recall correctly.

Q. Will you examine Respondent's Exhibits 1-A through 1-GGG, and point out which meetings you attended?

A. Do you want me to examine these carefully? I mean, go all the way through them?

Q. I am referring now to meetings in 1937.

A. Oh. Those are the only two I attended in that period of 1937.

Q. Did you dictate the minutes—may the record show that the witness has indicated Respondent's Exhibits 1-A and 1-B.

Did you dictate these minutes, either set of them? A. Yes, sir; both of them.

Q. You dictated them both? A. Yes, sir.

Q. Did you dictate them as they are now? Examine them, if you like, and make sure.

A. I can't make a microscopic examination, but I generally recognize my phrasealogy, and also, I know that I was the only one in the plant at the time who had had any experience writing minutes of this type. Mr. Dachtler hadn't, Mr. Hileman hadn't, and I know that I did it. [912]

Q. You know you did dictate those two sets of minutes. Is that correct?

(Testimony of Raymond S. Livingstone.)

A. Yes, sir; and the first memorandum of July 26th. I believe the date was that.

Q. Do you know whether or not the originals of those two sets of minutes bore a date at the time you read them over after having dictated them?

A. Usually we put the date right in the first paragraph, that a meeting of such and such was held at such and such a time. That is the way I usually start all the minutes off.

Q. I am referring to the date at the top of the sheet, not in the written part of the minutes.

A. I just couldn't say. I don't know.

Q. Have you ever dictated any other set of minutes of meetings of council and management?

A. You mean at Los Angeles?

Q. Here at Los Angeles.

A. Not that I can recall.

Q. Have you attended any meetings between the council and management since 1937?

A. Yes, sir.

Q. And you have not dictated minutes?

A. No, sir. I have only been present on two or three occasions, as a guest.

Mr. Moore: I think that is all. [913]

Mr. Watkins: No further questions.

Q. (By Trial Examiner Whittemore) How long were you with the Plain Dealer?

A. Two and a half years.

Q. What job? A. Reporter.

(Testimony of Raymond S. Livingstone.)

Q. Are you in the habit of using the same lead for every story?

A. Every lead answers about the same question: Who, what, when, how and where.

Q. I think you know what I mean.

A. Yes.

Q. You used the same sentence in the opening of every story, no matter what it was?

A. Of course not.

Q. Well. What was there about this meeting you had with the employees that came in there that caused you to put this in as a formal format, as minutes, and then: "There being no more business, the meeting adjourned," on there?

A. I had experience writing minutes of that type since 1934. I just decided it was a good idea to get it down.

Q. How many other occasions did you have when a group of employees came in and asked you to form an organization?

A. I think I had one occasion prior to that, perhaps two.

Q. Did one previous occasion form the habit with you? [914]

A. I didn't say it was a habit. I said it was a habit in Cleveland to write minutes of the meetings. I think it is a good idea, and I still think it is a good idea.

Q. If you are referring to minutes of an already formed organization, which I assume you mean, that's one thing; but this you have testified was

(Testimony of Raymond S. Livingstone.)

something which was very apparently unusual. And you can cite but one more instance.

A. As I explained before, it was a group demanding bargaining, and here is the C. I. O. trying to organize in the plant, and I just figured it would be a good time to get them down on paper so if later any question as to whether our action was proper or not came up, that was the story of what we told them.

Q. Would you say that correctly reflects the formal meeting? Your testimony of these minutes?

Mr. Watkins: May I have that question?

Trial Examiner Whittemore: I will withdraw it. I think it is not so clear, as I hear the echo of it myself.

Q. (By Trial Examiner Whittemore) Will you say this was a formal meeting that you had?

A. I wouldn't say it was formal or informal. It was a meeting to discuss recognition, and any meeting of that type, in my mind, is important enough to make a record of it, and those minutes were the way I had of making a record.

Trial Examiner Whittemore: I have no further questions. [915]

Mr. Watkins: That is all.

(Witness excused.)

Mr. Watkins: That is all from the respondent's standpoint, Mr. Examiner.

Trial Examiner Whittemore: All right. Have you any rebuttal?

Mr. Moore: Yes.

RAYMOND D. HAILEY,

called as a witness by and in behalf of the Board, having been first duly sworn, was examined and testified as follows:

Trial Examiner Whittemore: Will you take the stand and give your name to the reporter, please.

The Witness: Raymond D. Hailey.

Mr. Watkins: Mr. Examiner, may I interrupt and put Mr. Livingstone back on? There was something he would like to testify about, and that will complete it.

Trial Examiner Whittemore: That will be all right.

Mr. Watkins: If you don't object, Mr. Moore.

Mr. Moore: No.

(Witness temporarily excused.)

RAYMOND S. LIVINGSTONE

resumed the stand, and testified further as follows:

Redirect Examination
(Continued)

By Mr. Watkins:

Q. Mr. Livingstone, did you have a conversation with Mr. Victor Kangas with respect to what the [916] men wanted to do about joining a union? Did you have a conversation with him?

A. Yes, sir.

Q. Approximately when was it? Was it on your first visit or your second visit?

(Testimony of Raymond S. Livingstone.)

A. Well, on the second visit. I wanted to tell you about that.

Mr. Moore: I will object to that.

The Witness: Okeh.

Q. (By Mr. Watkins) Was it on your second visit? A. Yes, sir.

Q. Can you tell where it took place?

A. Yes, sir.

Q. Where? A. In Mr. Dachtler's office.

Q. Who was present?

A. Mr. Dachtler, I think Hodges was, I am not positive; Kangas, and myself.

Q. What was said at that meeting?

A. Well, this was immediately after the 18 or 20 employees had left. Kangas came in after the meeting and Dachtler was provoked because he wasn't there. Kangas said that the fellows liked their meeting, they were enthusiastic. He said, "in fact, a couple of them asked me how to get some application cards," and I told him, "Well, Vic, keep out of it. Tell them [917] to get an attorney; tell them to get it off the C. I. O. application cards; tell them anything, but you keep out of it."

Q. Was that all of that conversation?

A. That was all.

Mr. Watkins: That is all.

Mr. Moore: Read the answer.

(The answer was read.)

Trial Examiner Whittemore: 13-A, as I recall, you have not offered. You brought in one sheet of it and we had it marked. It is my understand-

(Testimony of Raymond S. Livingstone.)

ing that there is another sheet still on the way, or that will be taken care of some way.

Mr. Watkins: That is correct, your Honor. I want to add one thing: If there is any doubt in the Board's mind about the minutes having been dictated at the time, then, I am going to get hold of the stenographer, to have her come in and testify, or we can arrange a stipulation after the case is closed, with your permission.

Trial Examiner Whittemore: I have no question about who dictated it. The question in my mind is when it was dictated.

Mr. Watkins: That also goes for that. Then, I shall try to get hold of the stenographer and try to find out what the situation was.

Trial Examiner Whittemore: Well, I will tell you frankly [918] there is a doubt in my mind as to when it was dictated. The witness doesn't know.

Mr. Livingstone: No. I said I dictated it right after the meeting.

Trial Examiner Whittemore: Yes; but you haven't fixed the date. You admit you don't know when the date was put on.

Mr. Livingstone: The date is in the first paragraph.

Trial Examiner Whittemore: Is it your testimony it was July 26th that you held this meeting?

Mr. Livingstone: Yes. Yes. That is what I said: "on the morning of July 26th this group of employees came in and asked for a meeting which

(Testimony of Raymond S. Livingstone.)

was held in Mr. Dachtler's office on the afternoon of the same day."

I dictated that.

Trial Examiner Whittemore: I will have to admit I didn't read that text carefully. You don't know when the ink date was put at the top?

Mr. Livingstone: No. I think that is what Mr. Moore was referring to, the ink date. I said I didn't know when that was put on. But the day it was dictated is right in that first paragraph.

Trial Examiner Whittemore: I am satisfied to this extent, then, to state that it is a question of the weight to be given to the different testimony. Some of your own witnesses, some of Mr. Baldwin's witnesses, and some of the [919] Board's witnesses, all the witnesses up to this point have agreed on the 27th, according to my recollection. I am not going to state at the present time exactly what my finding is going to be. It is possible that there was a typographical error, and the reporter just asked me if it wasn't Tuesday. She was pretty sure it was Tuesday; and I know I have lost track of days of the week, and it is conceivable Mr. Livingstone was in error as to the exact date.

I say, I am not going to tell you now what the finding is going to be. I want to go over all the testimony of the witnesses. But there is a doubt in my mind as to the date of this meeting, at the present time. I am willing to take Mr. Livingstone's word, so far as his present recollection is concerned, that it was on the 26th. But I am not

(Testimony of Raymond S. Livingstone.)

going to assure you I am going to make a finding that it was on July 26th.

I don't think I can state it much more fairly than that, Mr. Watkins.

Mr. Watkins: Well, I do want permission—go ahead. We can get that straightened out later.

Trial Examiner Whittemore: All right.

Mr. Moore: I will call Mr. Hailey.

Trial Examiner Whittemore: Mr. Hailey has already been sworn. Take the stand, please. [920]

RAYMOND D. HAILEY

resumed the stand, and testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you state your full name, please.

A. Raymond D. Hailey.

Q. Are you employed by Thompson Products, Inc., at Bell California? A. I am.

Q. How long have you been so employed?

A. Since the 4th of March, 1936. It was then Jadson Motor Parts Company.

Q. What is your position there now?

A. Supervisor.

Q. Pardon me?

A. At the present time it is supervisor.

Q. When did you become supervisor?

A. I think it was in July, the first part.

Q. Of what year? A. Of this year.

(Testimony of Raymond D. Hailey.)

Q. Are you related to someone at the plant?

A. Yes, I am.

Q. Who? A. Roy Long.

Q. What position does he hold?

A. General foreman. [921]

Q. Do you recall the period in 1937 when the Pacific Motor Parts Workers Alliance was being formed? A. Some of it.

Q. Among the employees there.

A. Some of it. I can't recall everything that happened.

Mr. Watkins: Read the answer.

(The answer was read.)

Q. By Mr. Moore) Do you recall the first meeting of employees that was held for the purpose of organizing that Alliance?

A. I remember a meeting, but I don't remember whether it was the first or second.

Q. Was it the first you attended?

A. I don't remember.

Q. Who opened the meeting?

A. I don't remember that either.

Q. Did Mr. Bebb open it?

A. It is possible, but I wouldn't say that he did.

Q. Was Mr. Porter there, Lewis A. Porter?

A. At the meeting I remember he was not there when the meeting started.

Q. What did you do?

A. Some of the fellows wondered where he was,

(Testimony of Raymond D. Hailey.)

why he didn't show up, so I volunteered to go after him.

Q. Did you go after him? [922]

Mr. Watkins: I move the portion of the witness' answer be stricken: "Some of the fellows wondered," and something of that kind, on the ground it is hearsay and not the best evidence.

Trial Examiner Whittemore: Well, if he said "some of the fellows wondered," I will agree it may be stricken. I understood it to be, "Wanted to know." Did they say they wanted to know.

The Witness: Yes.

Trial Examiner Whittemore: Just state what they said.

The Witness: I don't remember a conversation like that such a long time ago, the exact words anybody used.

Trial Examiner Whittemore: State the substance of what they said. How did you happen to go after him?

The Witness: As I said before, they was wondering why he wasn't there.

Trial Examiner Whittemore: What I am getting at is: Did they convey what they were wondering? We all wonder, but we may keep it to ourselves. Did they say anything about it to you?

The Witness: They might say, "Where's Porter? Why isn't Porter here?"

Trial Examiner Whittemore: All right. Now you stated what was said.

(Testimony of Raymond D. Hailey.)

Q. (By Mr. Moore) Did you go over to his house and get him? [923]

A. I went over to his house.

Q. Was he home?

A. Yes, he was on the front porch.

Q. Did he go to the meeting with you?

A. No, he didn't.

Q. What reason did he give for not going?

A. He said the C. I. O. was putting a little pressure on him and he was afraid to go over there.

Q. Why was it wondered whether he was there or not? Why was it you were wondering why he was not there?

A. He had had something to do with organizing an independent union.

Q. He had been active in getting the men together for this organization? A. Yes.

Mr. Moore: That is all.

Mr. Watkins: I have no questions.

Trial Examinner Whittemore: All right. The witness is excused. Thank you.

(Witness excused.)

Mr. Moore: Call Mr. Drake.

EUGENE HARVEY DRAKE,

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, was examined and testified as follows: [924]

Direct Examination

By Mr. Moore:

Q. Will you state your full name, please.

A. Eugene Harvey Drake.

Q. During the period of July and August of 1937 where were you employed?

A. I was employed at Thompson—well, Jadson Motor Parts Company, then.

Q. In what capacity were you employed?

A. I was foreman—what date was that?

Q. In July and August of 1937.

A. I was foreman of the forge room at that time.

Mr. Watkins: Read the answer.

(The answer was read.)

Q. (By Mr. Moore) During the approximate period of July and August, 1937, did you meet Mr. Raymond Livingstone?

A. I met Mr. Livingstone. I can't remember the dates, but I presume it was around that time.

Q. Did you attend a dinner in Downey at Uncle Gabriel's? A. Yes.

Q. About when was that, according to your recollection?

A. That was in 1937 sometime; I presume it was, well, in the summer sometime, but I can't recall the date.

(Testimony of Eugene Harvey Drake.)

Q. Who was present at that meeting at Uncle Gabriel's?

A. All that I can recollect was Mr. Livingstone and myself and Victor Kangas and Lyman Hodges and Mr. C. A. Dachtler. [925] I believe that is all I can recollect at this time.

Q. Those people were all supervisory employees?

A. That is right.

Q. Why was that meeting called?

Mr. Watkins: Just a minute. I object to that as calling for a conclusion of the witness.

Trial Examiner Whittemore: I will sustain your objection.

Q. (By Mr. Moore) Were you told why that meeting was going to take place?

A. No, I wasn't told at the time.

Q. Who told you there was going to be a meeting?

A. I can't just remember whether it was Mr. Hodges or Mr. Dachtler. I can't remember now.

Q. Can you recall what was said at the time you were told a meeting would take place?

A. No, I don't recall what was said. I was told there was to be a meeting down at Uncle Gabriel's cabin. I don't recall whether there was mention of what the meeting was about at that time or not.

Q. What was discussed at that dinner?

A. Well, there was——

Mr. Watkins: I object to the form of the question, Mr. Examiner, as calling for a conclusion of

(Testimony of Eugene Harvey Drake.)

the witness, rather than a statement of conversation.

Trial Examiner Whittemore: Well, now, what are you asking [926] for? The subject matter.

Mr. Moore: Yes, that is what I was asking for.

Trial Examiner Whittemore: All right. You may state that.

Q. (By Mr. Moore): What subject was discussed there?

A. Well, I can't recall all the subjects that were discussed, in fact, very few of them, because it has been so long ago, and I haven't been connected with the company for quite some years, ever since 1939, and there was various subjects discussed. The company recently taken over the Jadson, was recently taken over, but Mr. Livingstone came out here, and so far as I know, or presumed, was to get the personnel organized——

Q. Well, now, referring to this meeting, what subjects that you remember were discussed there?

A. Well, I can't remember any definite subjects that were discussed except that at that time there was some discussion of a union, and I think the company stated—or, there was some discussion so far as the company was concerned, that they would prefer employees to have their own union, rather than an outside union. That is about as much as I can remeber that was discussed at that meeting.

Q. What was said at that meeting about a company union or an outside union?

A. Beg pardon?

(Testimony of Eugene Harvey Drake.)

Q. What was said at that meeting about a company union or an [927] outside union?

A. I can't recall just what was said at that meeting.

Q. What was the substance of what was said?

Mr. Watkins: I submit, Mr. Examiner, the question has already been asked and answered.

Trial Examiner Whittemore: I don't know; the witness may have—you mean you cannot recall the exact words?

The Witness: The substance of the meeting, as near as I can recall, it is pretty hazy in my mind, the whole thing, because that has been, as I said, quite some time ago. The substance, as near as I can recollect now, was to get together and have this dinner, that is, the boys were invited out to this dinner to meet Mr. Livingstone and formulate, I presume to formulate, a plan of how to carry out the business, and the subject of unionism there, as to which the company would rather have, or which they preferred, was whether an outside organization or their employees own organization, and that's about as much as I can remember of the first meeting. I think it was more or less of a get together to get these boys acquainted with some of the Eastern representatives of Thompson Products.

Q. (By Mr. Moore): Was preference expressed as between an inside and outside union?

Mr. Watkins: I submit, Mr. Examiner, the witness has already answered that question also. [928]

Mr. Moore: If he did I didn't hear it.

(Testimony of Eugene Harvey Drake.)

Trial Examiner Whittemore: I will permit the witness to answer.

The Witness: As near as I can recall now, the company at that meeting said that they would prefer an employees' own organization rather than an outside organization.

Mr. Moore: That is all.

Mr. Watkins: I have no questions.

Trial Examiner Whittemore: You are excused. Thank you.

(Witness excused.)

Mr. Moore: There is one other witness, Mr. Examiner, that I have been trying to get in touch with all day, Mr. Wendell Schooling, attorney. I haven't been able to get a representative to see him. He has been out of his office in court in Long Beach, and I don't believe he will be able to get in here today. I should like to call him. In view of the lateness of the hour, I think perhaps we could adjourn at this time.

Trial Examiner Whitttemore: Well, what do you means? Adjourn until tomorrow?

Mr. Moore: Yes.

Trial Examiner Whittemore: You are aware, aren't you, that I am supposed to start another hearing tomorrow morning?

Mr. Moore: Well, we may have to adjourn until a later date. [929]

Trial Examiner Whittemore: Why didn't you take this up with the Trial Examiner before this?

Up to a half hour ago I supposed we were going to close this afternoon.

Mr. Moore: I didn't know until about 3:00 o'clock that this man was in court today, and would be unable to get away. I have assumed we were going to get through today.

Trial Examiner Whittemore: I am not going to ask Mr. Watkins to hold himself available until you are able to get hold of some witness you don't know can appear. I am not going to ask the reporter, and I am not going to ask the Regional office to postpone another case. It seems to me this is something you should have taken care of before this. Have you consulted with the Regional attorney on this matter?

Mr. Moore: No, not since this morning.

Trial Examiner Whittemore: I suggest you take five minutes recess and that you consult with the Regional attorney and see what arrangements will be made. I think you will understand that I cannot ask Mr. Watkins to hold himself here until Mr. Schooling sometime or other shows up at an open hearing.

Mr. Moore: That wouldn't be fair.

Trial Examiner Whittemore: Mr. Watkins has other affairs, and so has Mr. Baldwin.

Mr. Watkins: You are not going to call Mr. Dachtler?

Mr. Moore: No. [930]

Trial Examiner Whittemore: Why don't you

discuss the matter with Mr. Farmer and then we will reconvene.

(A short recess.)

Trial Examiner Whitttemore: Are you ready to go on the record again?

Mr. Watkins: Yes, if the Examiner please.

Trial Examiner Whittemore: All right.

Mr. Watkins: The Board and Respondent are agreeable to the following stipulation:

That if Mr. Wendell W. Schooling were called and testified, he would testify that Mr. Porter did not hire him, but did refer to him the original constitutional committee appointed at the first meeting of employees.

Further, that Porter attended no committee meetings with him. Is that agreeable, Mr. Baldwin?

Mr. Baldwin: Yes.

Trial Examiner Whittemore: All right. Is that stipulation entered into by all parties?

Mr. Moore: So stipulated.

Trial Examiner Whittemore: Thank you very much. It is the understanding, Mr. Moore, this stipulation has been entered into to avoid calling Mr. Schooling.

Mr. Moore: That is correct, yes.

Trial Examiner Whittemore: All right. Now, I wonder if counsel will clear up this matter in the record where there [931] was a very apparent error as to the supervisory capacity of Mr. Porter.

Mr. Watkins: I think we can stipulate to that now.

Mr. Moore: May it be stipulated on Page 251 of the official transcript of this hearing at Line 9, the word "not" may be added after the word "was."

Mr. Watkins: So stipulated.

Mr. Baldwin: All right.

Trial Examiner Whittemore: Is that agreeable, Mr. Baldwin?

Mr. Baldwin: It is; yes, sir.

Trial Examiner Whittemore: It may so so corrected.

I will ask the reporter to make that correction in ink upon each of the transcript copies, and if they are not available, if certain copies have gone forward to Washington, that the correction be made therein in Washington, by the designated clerk, on the face of the record. You have your copy here, have you, Mr. Watkins?

Mr. Watkins: I have some copies, Mr. Examiner.

Trial Examiner Whittemore: Will you take care of that yourself, so far as your copy is concerned?

Mr. Watkins: This correction? Yes.

Trial Examiner Whittemore: Mr. Watkins, one point with which you are concerned, Board's Exhibit 13 and 13-A, these have not yet been received. Board's Exhibit 13 was offered and the ruling reserved; Board's Exhibit 13-A has not been [932] offered. It has been marked at my suggestion. My understanding is there was one more page that has not yet arrived.

Mr. Watkins: That is correct; it is on the way now.

Trial Examiner Whittemore: Do you want to make the offer on Exhibit 13-A?

Mr. Watkins: Yes, coupled with a second page which has an additional sentence on it.

Trial Examiner Whittemore: Have you any objection?

Mr. Moore: No objection.

Trial Examiner Whittemore: All right. Both exhibit 13 and exhibit 13-A are received, and I will ask the reporter to bear in mind that there is one more page on Board's Exhibit 13-A to be received, and if it is not received before the close of the hearing this afternoon, you, Mr. Watkins, will see she gets it at her office and it is bound in the record.

Mr. Watkins: Yes, sir.

(Whereupon, the documents heretofore marked Board's Exhibits 13 and 13-A for identification, were received in evidence.)

RESPONDENT'S EXHIBIT No. 13

7-26-37

Minutes of a meeting held between a group of employees and the Management of the Jadson Motor Products Company. On the morning of July 26, 1937 a group of employees of Jadson Motor Products Company asked for a meeting with the Management which was held in Mr. Dachtler's office in the afternoon of this same day.

This committee stated that they were forming an independent union to represent them in their collective bargaining under the terms of the Wagner Act. The Management stated that under the

terms of the Wagner Act they could not interfere with the formation or administration of any labor organizations or contribute financial support to it. The committee stated that they understood such to be the case but were making their statement because they wanted to confer with the Management during work hours. They also stated what their demands would be in regards to wages, hours and working conditions.

The Management stated that when their organization could show a majority of signatures of employees in the company, they would be in a position to negotiate with them, also that solicitation of members must be done outside of the plant and not during working hours. The committee then stated that when they had a majority of employees in their independent union, they would again ask for a meeting with the Management. The Management replied they would be willing and ready to confer with their representatives at any time.

There being no further business the meeting was adjourned.

RESPONDENT'S EXHIBIT No. 13-A

7-26-37

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There being no further business the meeting was adjourned.

Trial Examiner Whittemore: I think that takes care of all the documents. Do any counsel know of any documents that are not now received?

Mr. Watkins: There are two things I would like to mention: One is, we do have copies, you see, of 13-A, but they have designations of different exhibits. I don't know how, [933] unless we make other copies of 13-A, we are going to comply with the Board's request.

Trial Examiner Whittemore: That is all right. We will waive that.

Mr. Watkins: The second instance I am a little bit disturbed about is the question of the Examiner's mind about when 13-A was written. If it is possible to do it, or, I would like to ask permission of the Examiner for counsel from the Board and me to get together, if I can locate the stenographer who wrote this up, and have a written stipulation as to what she would testify with respect to that matter.

Trial Examiner Whittemore: Well, I don't know——

Mr. Watkins: I frankly think the document speaks for itself adequately, but there is some question raised by the Examiner.

Trial Examiner Whittemore: I will say this: That in all matters in this record so far in which there has been contradictory evidence, there is a question in the Trial Examiner's mind. His job is to resolve them. I simply told you, in answer to your question, that my main doubt is as to the actual date of this meeting. I am not sure even call-

ing the stenographer would clear that main doubt in my mind.

Mr. Watkins: That is what I was going to ask you: If it would aid in clearing up that doubt.

Trial Examiner Whittemore: It might aid in clarification [934] as to the date that this was dictated.

Mr. Watkins: Yes.

Trial Examiner Whittemore: But I don't know exactly whether it will do any good. It is a matter for you to consider.

Mr. Watkins: Does the Examiner, then, have any objection to our entering into such a stipulation with the Board, assuming we can get together?

Trial Examiner Whittemore: Not at all. Is that satisfactory with Board's counsel?

Mr. Moore: Yes.

Mr. Watkins: Thank you.

Trial Examiner Whittemore: Suppose we take a five minute recess.

(A short recess.)

Trial Examiner Whittemore: The hearing will come to order.

Mr. Watkins: It is my understanding, Mr. Examiner, that the stipulation that we entered into a short time ago with respect to a possible stipulation in the record concerning the testimony of the stenographer who took the dictation of and wrote up Respondent's Exhibit 13-A must be agreed upon by counsel for the Board and counsel for the Respondent within 48 hours. Otherwise, the calling of that witness is being waived. [935]

Trial Examiner Whittemore: By both counsel for the Board and counsel for the Respondent?

Mr. Moore: That is agreeable.

Trial Examiner Whittemore: Very well. In that event I will ask that—is Respondent's Exhibit 15 satisfactory? Respondent's Exhibit 15, we will reserve for the written stipulation, provided it is entered into, and if it is not received by the reporter within 48 hours, it will simply be cancelled. There will be no exhibit.

(Respondent's Exhibit 15 herewith reserved.)

Trial Examiner Whittemore: Are there any motions or anything further counsel wish to bring up at this time?

Mr. Moore: I will move to conform the pleadings to the proof, in the formal matters, such as dates.

Trial Examiner Whittemore: Do you join in that, Mr. Watkins?

Mr. Watkins: Well, that is only as to formal matters?

Trial Examiner Whittemore: That is right.

Mr. Watkins: I have no objection to your granting the motion.

Trial Examiner Whittemore: Why not make it a joint motion? That will cover any points that may appear in your pleadings, which your testimony may have proven otherwise.

Mr. Watkins: I will join in the motion. [936]

Trial Examiner Whittemore: Will you join that, Mr. Moore?

Mr. Moore: Yes.

Trial Examiner Whittemore: Very well; it is a joint motion. Is there any motion you care to make, Mr. Watkins?

Mr. Watkins: No, not at this time.

Trial Examiner Whittemore: Then, as I have told counsel perviously, I would like a brief statement from each as to his position with respect to what he believes has been proven.

Mr. Moore: All right.

Trial Examiner Whittemore: Now, would you like a five minute recess before you begin? Or are you ready now?

Mr. Moore: I would like a few minutes recess.

Trial Examiner Whittemore: All right. We will take a five minute recess. [937]

Trial Examiner Whittemore: I will call the hearing to order.

I suppose some explanation should be made on the record in view of the fact that the record was closed yesterday or ended yesterday.

The Trial Examiner made the statement that the hearing was closed, but since then the Trial Examiner has received information from counsel for both sides that the proposed stipulation was not arrived at and upon receiving that information the Trial Examiner offered counsel for the respondent an opportunity to bring the witness here this afternoon concerning whose testimony the question of the stipulation arose.

Therefore, the Trial Examiner will now formally order the hearing re-opened for the purpose of tak-

ing testimony as the counsel for the respondent feels he should put in in lieu of the proposed stipulation.

Mr. Watkins: Thank you, Mr. Examiner. Mrs. Thorpe.

MRS. BARRETT K. THORPE,

a witness called by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Trial Examiner Whittemore: Before going into this matter, I would like to ask each counsel if the Trial Examiner's statement is satisfactory and covers the matters, at least in brief, and that no counsel has any objection to the re- [947] opening of the hearing.

Mr. Watkins: As far as the respondent is concerned, the Trial Examiner's statements are correct and it is satisfactory. There is no objection.

Trial Examiner Whittemore: Mr. Moore?

Mr. Moore: No objection.

Trial Examiner Whittemore: Mr. Baldwin?

Mr. Baldwin: No objection.

Trial Examiner Whittemore: Very well, it may also appear on the record that all parties are present.

Mr. Watkins: Yes.

Trial Examiner Whittemore: You may proceed.

Direct Examination

Q. (By Mr. Watkins) Did you give your name to the Reporter, Mrs. Thorpe?

(Testimony of Mrs. Barrett K. Thorpe.)

A. Mrs. Barrett K. Thorpe.

Q. What was your name before you were married? A. Grace Evelyn Gillingham.

Q. Have you ever testified in any proceeding of any kind before? A. No, I have not.

Q. You were not married at the time you were working for Jadson or Thompson Products?

A. No.

Q. When were you first employed by Jadson? [948] A. In September 1933.

Q. And when did you leave that company or its successor, Thompson Products?

A. May 30, 1941.

Q. Does your husband work at the Thompson Products at the present time?

A. No, he doesn't.

Q. Directing your attention to a period around July of 1937, Mrs. Thorpe, what were your duties at that time there; what job did you hold?

A. Well, I took care of the switchboard and the stenographic work.

Q. Was there any other regular secretary for the office force besides yourself?

A. No, there wasn't.

Q. Do you remember, Mrs. Thorpe, on or around July of 1937, a group of workmen going into the office of the boss down at Jadson Company?

A. Yes, I do.

Q. Do you remember the particular incident?

A. Well, it made rather an impression on me because there were so many of them.

(Testimony of Mrs. Barrett K. Thorpe.)

Q. How many, roughly,—how many would you say?

A. Oh, about—anywhere between 15 and 20.

Q. Had any other group of that kind had you ever noticed [949] any other group of that kind in the office of the company? A. No, sir.

Q. And did this group come any place near any desk or place where you were working at the time?

A. Well, to get to the office they had to pass right through the office where I sat.

Q. Now, after that group went into the office, did Mr. Livingston call you into his office?

A. Yes, sir.

Q. And did he dictate anything to you after that meeting? A. Yes, he did.

Q. Do you remember generally of his dictating anything to you concerning that meeting?

A. Yes, it was about the meeting.

Q. Mrs. Thorpe, I show you Respondent's Exhibit 13-A and will ask you to examine that and to state if you can, whether or not that was what Mr. Livingston dictated to you at that time?

(Handing exhibit to the witness.)

A. Yes. [950]

Cross Examination

Q. Do you recognize this as your work?

A. Yes.

Q. You typed these two pages, referring to Respondent's Exhibit 13-A?

A. Well, I don't know about that particular

(Testimony of Mrs. Barrett K. Thorpe.)

copy, but I do remember Mr. Livingston dictating that to me. Whether other copies were made afterwards, I don't know. As to recognizing the type I couldn't do that.

Q. I don't mean the type, I just mean the document? A. Oh, yes.

Q. Are you of the opinion that this is the document you typed? A. Yes. [952]

Mr. Watkins: Mrs. Thorpe, when Mr. Livingston called you and dictated the substance of Board's Exhibit 13-A to you, was that on the same day as the group of men who came into the office?

The Witness: Yes.

Mr. Watkins: The group of 15 or 20 that you described? [957]

The Witness: Yes. [958]

BOARD'S EXHIBIT No. 15-A

United States Circuit Court of Appeals
Sixth Circuit

No. 9129

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THOMPSON PRODUCTS, INC.,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.*

Decided August 28, 1942.

Before Simons, Allen and McAllister, Circuit Judges for the Board: Argued by: Max Johnstone: On the brief: Messrs. Watts, Gross, Van Arkel, Miss Weyand, and Mr. Cook.

Simons, Circuit Judge:—The petitioner seeks a decree enforcing its order of August 1, 1941 [8 LLR Man. 312, 33 N.L.R.B. 1033], that the respondent cease and desist from dominating or interfering with organizations among its employees, withdraw all recognition of and disestablish the Automotive and Air Craft Alliance, Inc., and take certain affirmative ac-

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*33 N.L.R.B. 1033.

Board's Exhibit No. 15-A—(Continued)

tion. The respondent resists on the ground that the action of the Board was beyond its jurisdiction, barred by previous proceedings, and its ultimate findings and conclusions erroneous because unsupported by evidence. The Alliance intervenes in support of the challenge to the validity of the Board's order.

The respondent is engaged in the manufacture and sale of automobile parts in Cleveland, Ohio, and elsewhere, though the present proceeding involves only its Cleveland plants. In 1934 it cooperated with its employees in the formation of an organization known as "Thompson Products, Inc., Employees Association." This was an unaffiliated labor organization which, it is now conceded, became unlawful upon passage of the National Labor Relations Act [1 LRR Man. 803] because representatives of the employer were upon its governing council, and because its basic law recognized restraints upon action by employer representatives. It was therefore a labor organization dominated by the employer within the meaning of Sec. 8 (2), and the interference and restraint allowed to the employer by its constitution and its contracts with the respondent, invaded rights guaranteed by Sec. 7 and became unfair labor practices within the meaning of Sec. 8 (1).

In March and April of 1937 the United Automobile Workers of America, Local 300, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the Union, became active in an endeavor to organize the respondent's employees. It is

Board's Exhibit No. 15-A—(Continued)

clear upon the record that the respondent was opposed to this activity. In a number of articles appearing in its factory newspaper, "Friendly Forum," between March 26th and April 12th, comment was made derogatory of the Union and commendatory of the Association. These included an open letter in the April 9th issue, addressed to all employees and signed by the Association's employee representatives, which observed that "Recent statements made by an outside organization * * * in an effort to invade our plants prompt the candid opinion, that no organization can secure any concessions from management that the present Association cannot secure, and with less * * * ill will * * *."

On April 12, 1937, the Supreme Court, in a series of decisions upheld the constitutionality of the National Labor Relations Act (N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 [1 LLR Man. 703], and companion cases). Shortly thereafter the respondent posted upon its bulletin boards a notice which undertook to summarize the more important provisions of the Act. It called attention to the creation of the Board to decide questions of representation and to rule on alleged unfair labor practices, but declared the Board to be without enforcement powers, and concluded with the following: "It should be understood that this bill has been a law for nearly two years and this company has been observing its terms. Therefore, the supreme court's recent decision causes no change whatsoever in present plant conditions or relationships."

Board's Exhibit No. 15-A—(Continued)

Notwithstanding these assurances there was a feeling among some of the employee representatives in the Association, that their organization was not within the letter and spirit of the Act, and that some changes should be made in its constitution. They advised with Livingstone, respondent's director of personnel, who agreed that there should be revision, and advised that quick action should be taken because of awareness that the law was being violated. Wright, another officer of the respondent, was also consulted. He advised that incorporation was unnecessary, but that the Association might be improved by certain revisions in the constitution. At a meeting in the office of Crawford, respondent's president, it was suggested that revision should deal only with the purpose of the Association and the rules pertaining to eligibility for membership and election and eligibility of representatives, but that provision for presentation of grievances and relationships with management be left to contract. A committee to study and recommend changes in constitution was appointed. Subsequently certain changes were decided upon and later a revised constitution, purporting to conform to the Labor Act, was adopted.

Apparently there was still some doubt as to the validity of the Association. An independent attorney was consulted who suggested the incorporation of an entirely new organization. This advice was followed and the Alliance was born. Its incorporators and officers were, in the main, the employee delegates, representatives and committee chairmen of the older or-

Board's Exhibit No. 15-A—(Continued)

ganization. Immediately there began a solicitation for memberships among employees of the respondent, and on June 20th, at a joint meeting of the committee of representatives and officers of the new organization, it was reported that the membership committee had received 912 applications for membership, and it was voted to notify the respondent of an intent to seek a contract with it. While the organization of the Alliance and solicitation for members was going forward, the Union had likewise been active, but during this period the "Friendly Forum" continued its derogatory comment upon Union activities, while crediting the Association with substantial increase in employees' wages, and publicizing the Alliance campaign for memberships. In its columns was a statement by Arnold, temporary president of the Alliance, to the effect that it was the only sane method of bargaining collectively because the Alliance was not asking employees to pay high monthly dues, and its nominal dues would not go for salary to officers and organizers.

On June 21st a committee of Alliance officers met with respondent's personnel director in the office of respondent's president, exhibited 833 membership cards which were said to represent a majority of the employees, and requested an exclusive bargaining contract. It was arranged that the signatures should be checked, and when this had been completed, the committee was advised, on June 25th, by Livingstone, that the Alliance had a majority of employes, and

Board's Exhibit No. 15-A—(Continued)

that there was no alternative for the company but to grant it exclusive bargaining rights. Between June 25th and 30th the terms of the contract were tentatively agreed upon, and on the latter date, at a meeting in the offices of the attorney for the Alliance, it was voted to accept the contract and authorize its execution. On July 1st, at a meeting of the Joint Council of the Association, it was agreed that since a new union now represented a substantial majority of the employees, the contract between the respondent and the Association should be terminated. At the suggestion of Livingstone, a resolution was drafted as a testimonial to the achievements of the Association, and an agreement likewise was drafted terminating the Association's contract. On July 2nd, the contract between the respondent and the Alliance was signed, recognizing the Alliance as the exclusive representative of the respondent's Cleveland employees for the purposes of collective bargaining. It provided for the creation of a Labor Relations Committee consisting of an equal number of Alliance and management representatives for the purpose of adjusting grievances. In October, 1938, further contracts were made substantially similar.

The respondent does not assail the evidentiary fact findings of the Board. Its grievance is, in the main, directed to the inferences drawn therefrom and to the Board's ultimate conclusions. Before giving consideration to this challenge, however, it becomes necessary to dispose of contentions alleging jurisdiction-

Board's Exhibit No. 15-A—(Continued)

al infirmity and estoppel. The Board's complaint asserted the Union to be a labor organization within the meaning of Sec. 2 (5) of the Act. The respondent answered that it was unable to admit or deny this allegation. This, it now says, put in issue the existence of the Union. Notwithstanding, no evidence was offered to sustain the Board's allegation or its finding in that respect. Inasmuch as the Board has no power to initiate a proceeding on its own motion, but may do so only upon complaint of employees or of a labor organization which includes employees, and since the Board failed to prove existence of the Union, its qualification to file such complaint, or that it was capable of acting as a bargaining representative of the employees, if selected, it is urged that the Board had no jurisdiction and that the whole proceeding must fail.

This respondent, however, has been before the Board and before this court before, upon complaint of the same Union. N.L.R.B. v. Thompson Products, Inc., 97 F 2d [2 LLR Man. 707]. There was no contention then that the complaining organization was not a bona fide Union eligible to bring charges or qualified to function as a bargaining unit if selected by a majority of the respondent's employees. In the opinion in the case we said: "United Automobile Workers of America International Union is a national labor organization with approximately 350,000 members, workers in automobile and automobile accessory plants. In June, 1936, it affiliated with the Committee for Industrial Organization. On April 2,

Board's Exhibit No. 15-A—(Continued)

1937, representatives of the Union circulated handbills inviting all employees of the respondent to attend an open meeting in Cleveland, Ohio, to be held on Sunday, April 4, 1937, and about two hundred attended some of whom were members of an Employees' Association." No complaint was made of this finding. It would be a fantastic exaltation of procedural technicality to ignore facts which judicially we know, or to require proof, upon a mere speculation of unreality, of a condition that for so long has been accepted as established.

The estoppal contention of the respondent is based not only upon the previous proceeding here but upon still another complaint issued by the Board at the instance of the Union on March 8, 1939, subsequent to our decision, and alleging violations of Sec. 8 (1), (3) of the Act. The second proceeding was disposed of in October, 1940, by means of a stipulation of settlement. It is now urged that since the existence of the Association and the organization of the Alliance, together with the latter's recognition as an exclusive bargaining agency capable of contracting with the respondent, and the execution of contracts with it were all circumstances transpiring before the inauguration or during the proceedings upon the previous complaints, known to the complaining Union and the Board, the Board is now barred upon principles of estoppal or by the application of the doctrine of res adjudicata, from considering the charges of the Union or entering the present complaint. The legal question presented is stated thus: "May the same

Board's Exhibit No. 15-A—(Continued)

complaining Union split into three charges, and cause to be made into three cases against an employer over a period of more than three years, evidence which could have been included in either the first or second case, or both?"

Manifestly, good practice and a spirit of fairness dictates the consolidation of all current grievances into a single complaint, and an employer ought not to be harassed by repeated charges of invasion of employee rights during a given period of time. We are, however, obliged to bear in mind that a proceeding under the National Labor Relations Act is not litigation between private parties even though the inquisitorial and corrective powers of the Board may not be invoked without a charge being lodged by individual employees or an employee union. It is a proceedings by a public regulatory body in the public interest. It is neither punitive nor compensatory but preventative and remedial in its nature. N.L.R.B. v. Piqua Munising Wood Products Co., 109 F. 2d 552, 557 [6 LRR Man. 828, 833] (C.C.A. 6); Consumers Power Co. v. N.L.R.B., 113 F. 2nd 38 [6 LRR Man. 849] (C.C.A. 6). As we said of orders of the Board in N.L.R.B. v. Colten, 105 F. 2d 179 [4 LRR Man. 638], "they are to implement a public social or economic policy not primarily concerned with private rights and through remedies not only unknown to the common law but often in derogation of it." See also Agwilines, Inc. v. N.L.R.B., 87 F. 2d 146 [1 LRR Man. 277] (C.C.A.

Board's Exhibit No. 15-A—(Continued)

5), where it was said: "The proceeding is not, cannot be made a private one to enforce a private right. It is a public procedure looking only to public ends." It therefore would seem to follow that if the so-called bargaining agency is in any respect brought forth by employer domination or interference, and the contractual relationship with it is a continuing one, the effect is a continuing invasion of employee rights to bargain collectively through agencies of their own choice without interference of any kind by the employer, and the Board is not barred by any principle of estoppel or the doctrine of res adjudicata from putting a stop to it.

Prior to the enactment of the National Labor Relations Act and its adjudication as constitutionally valid, the respondent's employee organization, known as the Association, was undoubtedly dominated by the employer. Its representatives were paid by the respondent for time spent in connection with its affairs; its governing body, the Joint Council, was employer controlled and its expenses by it paid. It was not dis-established until after the Alliance war formed. In the period intermediate between the Jones and Laughlin decision, and the formation of the Alliance, the respondent undertook to advise and cooperate with its employees in respect to constitutional changes in the organization of the Association, which, it was hoped, would validate it under the Act. While the Alliance was being formed, the respondent, in its publication, condemned the activities of the outside union, ex-

Board's Exhibit No. 15-A—(Continued)

tolled the activities of the inside organization, and publicized the efforts of the Alliance in its drive for membership. The Board therefore concluded that the manner in which the Alliance was formed, and the support granted to it by the respondent during the period of its formation, indicated the respondent's desire to retain control of its employee representatives, and that since the originators of the Alliance were officers and leading spirits in the Association, they were, in the eyes of employees, representatives of management. It gave weight to the circumstance that the Association was not abandoned until after the Alliance was established, and to the fact that the respondent had previously, in its bulletin board notice, given emphasis to its view that the Labor Act and its validation made no change whatsoever in existing plant conditions or relationships. The Board was therefore of the opinion that the Alliance was successor to the Association, and that the employees had not possessed the freedom to choose their representatives, that is guaranteed to them by the Act.

The respondent and the intervenor insistently urge, however, that the organization of the Alliance proceeded from the initiative and independent will of the employees, was guided by counsel having no connection with the respondent, and that is consistently dealt with the employer at arm's length. They also greatly stress the fact that though 4,000 persons were employed by respondent at its Cleveland plants at the time of the hearing, not a single

Board's Exhibit No. 15-A—(Continued)

employee either in the collective bargaining unit involved, or in the complaining union, testified against the respondent. They insist that there is no evidentiary support for a conclusion that respondent's employees were of the belief that they would win employer approval if they joined the Alliance, or incur displeasure if they refused, though all of them were available as witnesses.

We have been told, in terms beyond the possibility of misunderstanding, and repeatedly, that by the National Labor Relations Act, Congress has entrusted power to draw inferences to the Board and not to the courts. N.L.R.B. v. Falk Corp., 308 U.S. 453, 461 [5 LRR Man. 677, 681]; N.L.R.B. v. Greyhound Lines, Inc., 303 U.S. 261, 271 [2 LRR Man. 599, 603]; N. L. R. B. v. Newport News Shipbuilding and Dry Dock Co., 308 U.S. 241 [5 LRR Man. 665]; N.L.R.B. v. Link-Belt Co., 311 U.S. 584 [7 LRR Man. 297]. In the Falk case, an inference was held to have been drawn justifiably that a company created union could not emancipate itself from habitual subservience to its creator without being completely disestablished, so as to insure that employees would have complete freedom of choice guaranteed by Sec. 7 of the Act. In the Link-Belt case it was held that the Board had a right to believe that the maintenance of a company union down to the date when another internal union was organized was not a mere coincidence, and that this circumstance made credible the finding that complete freedom of choice on the part of employees

Board's Exhibit No. 15-A—(Continued)

was effectively forestalled when there had been a declared hostility to an outside union. In International Association of Machinists v. N.L.R.B., 311 U.S. 72, 78 [7 LRR Man. 282, 285], it was said that "slight suggestions as to the employer's choice between two unions may have a telling effect among men who know the consequences of incurring the employer's displeasure."

Great stress is laid by the respondent on its neutrality between the outside union and the Alliance. We have examined the record with care and find little evidence of it. Certainly, its continued attacks upon the outside union in its publication give little support to its alleged neutrality, and its assertion that the Act required no change in its employer-employee relations is not the proclamation of a neutral attitude.

In our consideration of the decisions above noted, we are forced to the conclusion that the test, whether a challenged organization is employer controlled, is not an objective one but rather subjective, from the standpoint of employees. As was said in the case of International Association of Machinists v. N.L.R.B., supra, approved in the Link-Belt case, supra, "If the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the completely unhampered freedom of choice which the Act contemplate." Given the circumstances heretofore recited, there is room for such inference. Granted

Board's Exhibit No. 15-A—(Continued)

that employees were not called by the Board as witnesses to support its inference, the way was equally open to the respondent to repel it, and the failure of the one bulks no larger than the silence of the other. It is idle to argue that the acts of the respondent were justified because committed during the earlier days of the operation of the Labor Act and before the great body of law now existing had been developed. As already indicated, a Labor Board proceeding is not punitive but remedial and preventative. The purpose of the Act is to secure the right of free choice to employees in the selection of their bargaining agencies, and so circumstances in mitigation of an employer's labor policy are not appropriate subjects for consideration. The employer must keep his hands off, and completely. This is the doctrine of the adjudications binding upon us. We are of the opinion that the Board's order, insofar as it directs the respondent to cease and desist from dominating or interfering with the administration of the Alliance, and from giving effect to any and all contracts with it, must be enforced.

The order must, however, in some other respects, be modified. It is clear that the original company union, the Association, has long since been disestablished and the respondent's contracts with it abrogated. There is no prospect of a resurrection. It has been pointed out that Sec. 10 (c) was not intended to give the Board power of punishment or retribution for past wrongs or errors. N.L.R.B.

Board's Exhibit No. 15-A—(Continued)

v. Newport News Shipbuilding and Dry Dock Co., supra. As was said in E. I. duPont de Nemours and Co. v. N.L.R.B., 116 F. 2d 388, 401 [7 LRR Man. 411, 422] (C.C.A. 4): "No useful purpose would be served here by 'whipping the corpse'." Paragraph 1 (a) of the order must be amended by striking therefrom all reference to Thompson Products, Inc., Employees Association.

Paragraph 1 (c) of the Board's order must also be eliminated. It directs the respondent to cease and desist from "In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization." It is not supported by evidence. N.L.R.B. v. Express Publishing Co., 312 U.S. 426, 434 [8 LRR Man. 415, 418]; N.L.R.B. v. American Rolling Mill Co., 126 F. 2d 38, 42 [10 LRR 63] (C.C.A. 6).

We have given no consideration to the contention that the articles in the "Friendly Forum" are protected by the guaranties and immunities of the First Amendment to the Constitution of the United States, N.L.R.B. v. Ford Motor Co., 114 F. 2d 905 [7 LRR Man. 441] (C.C.A. 6), since they are untouched by the Board's order. Insofar as they disclose the attitude of the respondent, they may bear upon restraint, even though no power resides in the Board to limit the respondent's constitutionally protected freedom of expression.

The order will be modified in the respects here indicated, and as modified will be enforced by an appropriate decree.

In the United States Circuit Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THOMPSON PRODUCTS, INC.
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board — Series 2, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of a proceeding had before said Board entitled, "In the Matter of Thompson Products, Inc. and United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with Congress of Industrial Organizations," the same being Case No. C-2392 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony before Trial Examiner Whittemore for the National La-

bor Relations Board on October 1, 2, 3, 5, 6, 7, and 8, 1942, together with all exhibits introduced in evidence.

(2) Copy of the Intermediate Report of Trial Examiner Whittemore, dated October 28, 1942.

(3) Copy of order transferring case to the Board, dated October 30, 1942.

(4) Copy of respondent's letter, dated November 2, 1942, requesting extension of time to file exceptions and brief.

(5) Copy of letter, dated November 5, 1942, granting all parties extension of time to file exceptions and brief.

(6) Copy of respondent's letter, dated November 12, 1942, requesting oral argument before the Board.

(7) Copy of respondent's exceptions to the Intermediate Report.

(8) Copy of notice of hearing for the purpose of oral argument, dated November 28, 1942.

(9) Copy of appearance sheet, dated December 17, 1942, showing no appearances at oral argument.

(10) Copy of decision and order, dated December 31, 1942, and annexed Intermediate Report, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of

Washington, District of Columbia, this 5th day of March 1943.

[Seal] JOHN E. LAWYER
Chief, Order Section
National Labor Relations Board

[Endorsed]: No. 10383. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Thompson Products, Inc., a corporation, Respondent. Transcript of Record. Upon Petition for Enforcement of an Order of the National Labor Relations Board.

Filed March 10, 1943.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10383

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THOMPSON PRODUCTS, INC.,
Respondent.

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

Comes now the National Labor Relations Board, petitioner in the above proceeding, and, in conformity with the revised rules of this Court heretofore adopted, hereby states the following points as those on which it intends to rely in this proceeding:

1. Upon the undisputed facts, the Act is applicable to respondents and to the employees herein involved.

2. The Board's findings of fact are fully supported by substantial evidence. Upon the facts so found, petitioner has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (2) o fthe Act.

3. The Board's order is wholly valid and proper under the Act.

Dated at Washington, D. C., this 5th day of March 1943.

NATIONAL LABOR RELATIONS BOARD

By ERNEST A. GROSS
Associate General Counsel

[Endorsed]: Filed Mar. 10, 1943. Paul P. O'Brien, Clerk.

No. 10383

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THOMPSON PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10383

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THOMPSON PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Supp. V, Title 29, Sec. 151, *et seq.*). The jurisdiction of this Court is based upon Section 10 (e) of the Act. Respondent is an Ohio corporation having its principal office in the city of Cleveland, Ohio. It operates a plant in Bell, California, where the unfair labor practices herein occurred.

STATEMENT OF THE CASE

Upon the usual proceedings had pursuant to Section 10 of the Act which are described in the Board's decision (R. 50–53), the Board issued its findings of fact, conclusions of law, and order (R. 46–79; 46 N. L. R. B. 514,[1] which may be briefly summarized as follows:

1. *Nature of respondent's business.*—Respondent, an Ohio corporation with its principal office in Cleveland, operates industrial plants in Cleveland, Ohio; Detroit, Michigan; Bell, California; and, through Thompson Products, Ltd., a subsidiary corporation, in Canada. At its Bell plant, respondent is engaged in producing and selling aircraft engine bolts and miscellaneous engine and fuselage parts. Respondent purchased this plant as a going concern on April 8, 1937, from Jadson Motor Products Company and operated it under the name of that Company until about July 1, 1940. Since the latter date, the plant has been operated under the name, "Thompson Products, Inc., West Coast Plant."

Steel is the principal raw material used by respondent at its Bell plant. In 1941 respondent purchased steel valued at not less than $350,000, of which about 85 percent was purchased and transported from sources of supply located outside the State of California. During the same year it manufactured at the

[1] In accordance with its recent practice, the Board's decision herein is in memorandum form, incorporating by reference those portions which it approves of the findings of fact, conclusions of law, and recommendations contained in the intermediate report of the Trial Examiner. In the instant case the Board adopted all but one of the Trial Examiner's findings, conclusions, and recommendations, rejecting only his conclusion that one Charles Little occupied a supervisory position (R. 46–47).

Bell plant, and sold, products valued at not less than $1,500,000. About 65 percent of these sales were made to customers outside the State of California. Respondent employs about 400 workers at its Bell plant.[2]

2. *The unfair labor practices.*—Respondent dominated and interfered with the formation and administration of Pacific Motor Parts Workers Alliance, herein called the Alliance, and contributed financial and other support to it, and by these and other specified acts, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8 (1) and (2) of the Act (R. 69–70, 73, 76).[3]

3. *The Board's order.*—The Board ordered respondent to cease and desist from the unfair labor practices found, to withdraw all recognition from and completely disestablish the Alliance as the collective bargaining representative of its employees, and to post appropriate notices (R. 47–49).

SUMMARY OF ARGUMENT

I. The Board's findings of fact are supported by substantial evidence. Upon the facts found, respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act.

II. The Board's order is wholly valid and proper under the Act.

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[2] The Board's findings of fact as to respondent's business are based upon a stipulation entered into between counsel for the Board and for respondent (R. 95–96). No jurisdictional issue is presented.

[3] The relevant portions of the Act are printed in the Appendix, *infra*, pp. 20–21.

ARGUMENT

POINT I

The Board's findings of fact are supported by substantial evidence. Upon the facts found, respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act

A. Respondent's domination and support of the Alliance

1. Formation of the Alliance

Respondent took over the Bell plant in April 1937 (R. 95). A great deal of unrest and dissatisfaction had developed at that time among the employees over low wages, and the latter also were apprehensive that the new management might transfer the operations of the plant to its other branches (R. 337, 413–414, 1176–1177, 1229). The United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the Union, began an organizational campaign at the plant during this period, and a number of the employees applied for membership therein (R. 257–258, 376, 772–773).

In June 1937 respondent took definite steps to defeat the Union's organizing drive. General Manager C. V. Dachtler instructed Assistant Works Manager Victor Kangas to arrange to have an employee join the Union, at respondent's expense, for the purpose of ascertaining what progress it was making in organizing the employees (R. 420–422). Kangas asked an employee named Lewis A. Porter, with whom he was friendly, and who had had police experience, to undertake this espionage. Porter was given the money for his union dues by Head Inspector Lyman Hodges, then

acting as the local personnel manager. Porter joined the Union, attended two meetings, and reported on them to Kangas (R. 232; 261–266; 340; 373–376; 420–422).

Also during June 1937, Raymond S. Livingstone, respondent's director of personnel, came from Ohio to investigate charges that two employees had been discharged by Kangas because of their membership in the Union (R. 423–424, 1227). On this visit, Livingstone "check[ed] into conditions in the plant, from the entire standpoint of personnel administration" (R. 1228). Kangas told him of the existing unrest, and in answer to a question as to "what the union situation was in the plant," informed him that "it was mostly C. I. O." (R. 1230).

Livingstone again visited the Bell plant on July 23 and this time set about organizing concrete opposition to the Union. He conferred with Dachtler and Kangas, and asked the latter to name an employee who could be trusted to initiate the organization of an inside union (R. 337–339). Dachtler also recommended the formation for the employees of "a labor organization of their own," and suggested that the department heads be called together for dinner that night (R. 339). Accordingly, a meeting was held that evening, attended by all the department heads and subforemen or leadmen (R. 340–341). At this meeting, Livingstone announced that Crawford, respondent's president, would not tolerate an "outside" union, and that, consequently, if any such union, either A. F. of L. or C. I. O., succeeded in organizing the plant, it would be

closed, and the equipment moved back East (R. 342). Livingstone also told the assembled supervisors that the Company preferred an "independent" union; that respondent's Detroit plant was organized by the C. I. O. and the Cleveland plant by an "independent" union; and that respondents had "had one headache after another with the C. I. O.," while its relationship with the "independent" had been satisfactory (R. 1235–1236; 1274–1275; 438; 1294; 1296).[4] He asked the supervisors to keep what he had said confidential, and not to let the employees know that "the company [had] ordered an independent union" (R. 341, 439).

After the meeting Livingstone asked Kangas again whether he could suggest an employee to act as bell-wether for respondent by starting an "inside labor organization" and bringing as many employees as possible to the plant office to ask for improved working conditions. Kangas answered that he could not think of anyone at the moment, and Livingstone suggested that he "sleep on it" and see what he could do the next day (R. 342–343; 440). The next morning, at the plant office, when Livingstone renewed the subject, Kangas suggested Porter, pointing out that he was an older man, had done police work, and could, in Kangas' judgment, be trusted to handle a confidential matter (R. 343–344; 440–442; 444). Kangas then approached Porter in the plant, outlined what Livingstone wanted

[4] The "independent" at Cleveland was found by the Board to have been dominated by respondent. Its finding was sustained by the Circuit Court of Appeals for the Sixth Circuit. *N. L. R. B.* v. *Thompson Products, Inc.*, 130 F. (2d) 363, enforcing 33 N. L. R. B. 1033.

him to do, and secured his assent to undertaking the task (R. 345–6; 442–443). In accordance with arrangements made earlier in the day (R. 345–346), Porter went to Livingstone's quarters at the Jonathan Club that evening, where he found Dachtler and Livingstone (R. 213–215). He was instructed to approach the employees in the plant the next day and enlist 12 or 15 of them to accompany him to the office, where, acting as spokesman, he was to ask the management for recognition of a "union of their own," better working conditions, and "a little more pay" (R. 217–218; 284–285). Livingstone promised Porter that he would be rewarded for his services by being given a lifetime job, a vacation with pay, and a sum of money (R. 285–287). On the following Monday, Porter began to execute respondent's instructions. He approached various employees in the plant and urged them to get together "to put it up to the management what we wanted . . . a little better working conditions, more pay, and form an independent union of their own" (R. 224–225).

During the same Monday morning Kangas informed Livingstone that he had heard that the C. I. O. was planning a meeting for Tuesday evening, at which time a contract was to be considered for submission to respondent. Livingstone decided to "crack that meeting before Tuesday evening" and urged Kangas to tell Porter to bring a group of employees into the office to make appropriate demands upon the management. He "didn't care what they came in for, as long as they came in and asked for something" (R. 347–348). He

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emphasized that it was imperative that at least 51 percent of the employees be herded into "an organization of their own" before Tuesday evening in order to keep them from attending the Union meeting (R. 349). Kangas accordingly asked Porter that afternoon to try to get his group of employees into the office by 2 o'clock the next day; Porter said he would try to do so (R. 349–350).

That evening Kangas called for Porter at the latter's home and then telephoned Livingstone who dictated to Kangas the text for an application card to be printed for the organization which respondent was forming (R. 226–227; 351–352). Kangas handed the text to a printer and ordered the cards for the next day (R. 353–354). On Tuesday, Porter, without checking out, left the plant as he had been instructed, picked up the cards (R. 228; 355), and on his return gave them to Head Inspector Hodges (R. 231–232).[5] Thus the application cards were ready and a name was selected before the employees took any steps to form "their" organization.

During the afternoon of July 27, Porter, pursuant to the program laid down by Livingstone (*supra*, pp. 6–7), led a group of 15 to 20 employees to the plant

[5] In an attempt to discredit Porter's testimony that the application cards were procured as he described, the Alliance introduced evidence tending to show that Porter was mistaken in testifying that he did not advance the money for the printing (R. 1123–1128). But this evidence confirms the crucial fact that Porter and not the Alliance arranged for the printing. Moreover, none of the early leaders of the Alliance knew anything about how the cards came to be printed or how the name of the organization printed thereon was selected (see, e. g., R. 677).

office. Acting as spokesman, he asked Livingstone and Dachtler for permission to form an independent union and for various improvements in working conditions (R. 232–235; 306–307; 651–652). Dachtler gave the requested permission and said that respondent was willing to consider granting pay raises and vacations with pay (R. 306–307). The committee was told to obtain the adherence of a majority of the employees (R. 652; 1301). At the close of the shift that day several employees, stationed at the plant gate, passed out the application cards which had been prepared and announced that an organizational meeting would be held that evening (R. 236–237; 362; 653). At the meeting thus announced, the employees decided to form the organization which respondent had conceived and a committee was selected to prepare an appropriate constitution (R. 654–655; 656–657; 1078–1080).

A day or so after the organization meeting of July 27 Livingstone gave Porter a rough draft of a proposed working agreement and told him to submit it to an attorney to be put in legal form. Porter selected one Wendell W. Schooling, who expressed dissatisfaction with the document after examining it, and suggested that Porter tell the management to send someone to discuss it with him (R. 240–244; 368–369). Thereafter, Porter referred the constitution committee of the Alliance to Schooling (R. 1298), and a constitution and bylaws were drawn up for the organization by this attorney (R. 658–659; 1080–1081; 1126). At this point Porter dropped out of

further active participation in the Alliance (R. 308).

Later in the week, Kangas, Porter, and Hodges were praised by Livingstone for the work they had done, at a dinner given by the latter to celebrate respondent's success in arranging the formation of the Alliance (R. 369–371). Thereafter, Porter received as the promised reward for his services an unprecedented 2-week vacation with pay (R. 249–250, 252–253).[6]

On August 12, respondent entered into a written contract with the Alliance, according it recognition as the exclusive bargaining agent for all employees at the Bell plant, granting an increase in wages, and agreeing to negotiate with the Alliance a plan to institute vacations with pay (R. 122–129). Since its execution, the contract has been renewed annually and at the time of the hearing an agreement for one year was in effect, dated November 10, 1941, which contained an automatic annual renewal clause (R. 188–208).

2. Respondent's financial and other support of the Alliance, after its formation, and interference with its administration

After its establishment, the Alliance continued to receive valuable support from the management. Its executive council regularly met in the plant during working hours (R. 565–568; 1164), and its officials openly solicited members and collected dues in the plant on Company time (R. 507–511; 511–513; 530–536; 606–607). A mild remonstrance against this activ-

[6] Up to this time, the hourly paid employees had not been given paid vacations (R. 407).

ity by the management in June 1942 (R. 1093–1094) was ignored by the Alliance; yet no disciplinary action was taken (R. 1145).[7]

The extent to which the Alliance is in fact company-bound is shown by its acquiescence in management interference in its internal affairs.[8] In fact, such interference was not merely tolerated, it was sought by Alliance officials. In February 1942, when President Hess of the Alliance resigned, Overlander, a member of the executive council, consulted Plant Manager Hileman in regard to a successor. Hileman expressed disappointment at Hess' resignation, saying that he had just given him "quite a build-up" in the magazine of the Society of Automotive Engineers. He then proposed various employees for the position of president and objected to one on the ground that

[7] Contrast this tolerant attitude with the severe manner in which the management asserted its disciplinary powers over members of the Union. On one occasion, Plant Manager Hileman heatedly told two employees, Smith and Spencer, whom he knew to be members of the Union, that he would throw them bodily out of the plant if they conducted any union activities on company time (R. 582; 615; 1186). Another employee, Jolly, who handed out a few union cards in the lunch room during a lunch period, was approached the next night by Foreman Guenzler and warned that the Company would not tolerate such activities even during the lunch period. The next night a bulletin was posted instructing employees to refrain from conducting private activities in the lunch room (R. 623–627).

[8] Since its organization the Alliance executive council has met at intervals of from 1 to 3 months with the management, in the plant, on company time (R. 814–1070; 1095–1096; 1097). The minutes of the first two of these meetings were prepared by Livingstone (R. 1280). The minutes of subsequent meetings were submitted to the management before being posted on the plant bulletin board (R. 811–812).

"we should have an older man" (R. 631–634). Similarly, in the fall of 1941, Alliance President Baldwin and executive council member Smith became disturbed about the participation in Alliance affairs of various supervisors. They went to Personnel Manager Millman and submitted this vital matter to him for decision (R. 1138–1139; 1146–1148). On October 23, 1941, without further consultation with any Alliance representative, Millman posted a notice in the plant, declaring that certained named employees, since they held supervisory positions, were ineligible for membership in the Alliance and were being asked to resign. The question was not submitted to the membership of the Alliance (R. 555–556; 1105–1106; 1150).

The record amply demonstrates what respondent thus acknowledged: That supervisory employees played leading roles in the Alliance at the time of its origin and for years thereafter. Several of the employees belatedly named by the management in its notice of October 23 as ineligible for membership in the Alliance were numbered among its active organizers. James Creek, first president of the organization (R. 814), served in this office for about 3 or 4 months while he was at the same time head of the plant's maintenance department (R. 1091–1092). E. T. Fickle, one of the supervisors named in the notice, took over Creek's duties when the latter was transferred to the sales department in 1938 (R. 1091). His duties have remained the same since that time (R. 537). Fickle had served on the executive council of the Alliance since its inception and had also served

as president for a long period, being reelected in September 1941 and serving thereafter in this office for about a month and a half until he was recalled (R. 539–540; R. 546, Bd. Exh. 10). C. E. Weisser, supervisor of the heat-treat department and an executive council member, had occupied his supervisory position for about 2 years previous to October 1942 (R. 1102) and had been a member of the executive council for at least 1 year of this time (R. 536–537; 553).

3. Summation as to the Alliance

The Alliance is entirely a creation of respondent. The employees participating in its formation acted as no more than rubber stamps. The actual mechanics of its launching were carried out in part by high Company officials, Livingstone, Dachtler, and Kangas, and in part by an employee, Porter, who acted as their "recruiting sergeant." *Triplex Screw Co.* v. *N. L. R. B.*, 117 F. (2d) 858, 860 (C. C. A. 6).[9] An attorney was selected for the Alliance by the employer's agent (*supra,* p. 9),[10] and various steps in its organization, such as the preparation of membership application cards, the creation of a committee to make demands on the Company, and the calling of

[9] The use of such agents in the formation of company-dominated unions is a familiar phenomenon. See, in addition to the *Triplex* case, cited in the text, *Union Drawn Steel Co.* v. *N. L. R. B.*, 109 F. (2d) 587, 590–591 (C. C. A. 3); *N. L. R. B.* v. *Moltrup Steel Products Co.*, 121 F. (2d) 612, 617 (C. C. A. 3); *Atlas Underwear Co.* v. *N. L. R. B.*, 116 F. (2d) 1020, 1022–1023 (C. C. A. 6); *N. L. R. B.* v. *Good Coal Co.*, 110 F. (2d) 501, 505 (C. C. A. 6), cert. denied, 310 U. S. 630.

[10] *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 453, 461; *N. L. R. B.* v. *Baldwin Locomotive Works*, 128 F. (2d) 39, 49 (C. C. A. 3).

the first meeting, were all the work of the Company's officers and were carried out according to a blueprint laid down by them (*supra,* pp. 6–9). At the same time, the Company made sure of adequate information to guide its steps by engaging in the illegal practice of espionage (*supra,* pp. 4–5).

The creation of the Alliance was attended by Livingstone's open and clearly illegal expression to the plant supervisors of respondent's hostility to the C. I. O. and preference for an inside union (*supra,* pp. 5–10).[11] Thereafter, "emulating the example set by the management" (*International Association of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 81), supervisory employees dominated its leadership and gave it support (*supra,* pp. 10–13). After the Alliance was under way, respondent directly interfered ~~i nits~~ affairs on more than one occasion (*supra,* pp. 11–13), and gave it typically illegal Company support (*supra,* pp. 10–13) resulting in important advantages over any *bona fide* union seeking the employees' allegiance.

With respect to respondent's violation of Section 8 (2) of the Act, this case is on all fours with the recent decision of this court in *N. L. R. B.* v. *Germain Seed and Plant Co.,* 134 F. (2d) 94 (C. C. A. 9). There, as here, an inside organization was called into being by agents of the employer who suggested the attorney who prepared the organization's constitution; once launched, the organization was run by supervisory employees and given valuable employer support. We sub-

[11] *International Association of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 78; *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 600.

mit that the Board's conclusion that respondent dominated and interfered with the formation and administration of the Alliance and contributed financial and other support thereto (R. 70), is fully supported by substantial evidence.

B. Interference, restraint, and coercion

We have noted that at the time of respondent's acquisition of the Bell Plant, the employees were apprehensive that it might be closed and its operations moved by respondent to its other plants (*supra*, p. 4). In its campaign to disrupt the Union's organizing drive, respondent exploited this fear to the utmost. Livingstone took an early opportunity to warn the supervisors that if the plant was organized by a nationally affiliated union, it would be closed down (*supra*, pp. 5–6). Similar threats were voiced by Hodges to Porter in 1937 (R. 293–294); by Hileman to a committee of the Alliance in 1938 (R. 390–391); and by Millman to an employee in 1942 (R. 577). The coercive nature of threats of this kind is well settled.[12] They go to the very root of the employees' economic security by threatening a permanent curtailment of their opportunities for earning a livelihood.

Respondent's supervisors engaged in other no less effective methods of restraining union membership.

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[12] *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 335; *N. L. R. B.* v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780, 788 (C. C. A. 9); *N. L. R. B.* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 195–196 (C. C. A. 9); *N. L. R. B.* v. *Germain Seed and Plant Co.*, 134 F. (2d) 94 (C. C. A. 9); *Oughton* v. *N. L. R. B.*, 118 F. (2d) 486, 488–489 (C. C. A. 3), cert. denied 315 U. S. 797.

When Employee Overlander applied for a job in December 1940, Personnel Director Millman asked him whether he belonged to a union. On being told by Oberlander that he was an inactive member of the Teamsters' Union, Millman advised him that respondent had a union in its shop with which it had "very friendly relations" (R. 628–629). The significance of this statement was not lost on Overlander; he "got the impression that Thompson's was more or less in favor of not having an outside union in there" (R. 630), and joined the Alliance (R. 631). When Employee Crank advised Millman in April 1942, that he was dissatisfied with the Alliance and was considering joining the Union, he became the subject of an organized campaign to make him change his mind, participated in by no less than three of respondent's management hierarchy (R. 514–518). Porter, similarly, was warned bluntly by his foreman that, "When you put that C. I. O. button on you are hanging out your neck. Somebody will take a crack at it" (R. 273–274).[13]

Respondent's extreme hostility to the C. I. O. was also voiced to its employees in its official publication, *Friendly Forum,* which is distributed without charge to all employees (R. 501, Bd. Exh. 8). An editorial carried in the issue of May 29, 1941, for example, proclaimed that (R. 1262):

> The C. I. O. has shown more contempt for Defense Efforts than it has shown desire to cooperate, while the A. F. of L. has stated a

[13] The record reveals one other extremely vulgar attempt to cast aspersions on the Union which need not be set out here in detail (R. 518–521; 617–618).

> desire to cooperate, but both have been militant in their efforts to prevent even the slightest curtailment of labor's rights, especially labor's right to strike.

The issue of September 19, 1941 reprinted an address hostile to unions by Earl Harding, which depicted them as led by dangerous agitators. The following is a typical excerpt (R. 1271):

> * * * we permitted labor organizations to be trained in Communist "labor colleges," not by educators but by agitators. We even paid expenses of such "students" to Russia for post-graduate courses in revolutionary technique * * * Then we let Communists impregnate, in many instances dominate, the American labor movement. And, in the name of "academic freedom," we let their poison filter into our schools.

The Board's conclusion that the foregoing acts and statements of respondent's supervisors, and the distribution of anti-union articles to its employees, interfered with, restrained, and coerced its employees in the rights guaranteed in Section 7 of the Act, was clearly proper. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 78; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 588–590; *N. L. R. B.* v. *Germain Seed and Plant Co.*, 134 F. (2d) 94 (C. C. A. 9); *N. L. R. B.* v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780, 788 (C. C. A. 9); *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. C. A. 9), cert. denied 312 U. S. 678; *N. L. R. B.* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 756, 757 (C. C. A. 7); *N. L. R. B.*

v. *New Era Die Co.*, 118 F. (2d) 500, 505 (C. C. A. 3); *N. L. R. B.* v. *Locomotive Finished Material Co.*, 133 F. (2d) 233, 234 (C. C. A. 8).

It cannot be contended here that respondent's assaults upon the Union were privileged as an exercise of the right of free speech. Its warnings that the plant would be closed, that the wearing of a C. I. O. button would jeopardize the wearer's job in the plant, and the like (*supra*, pp. 5–6, 15–17), were no mere expressions of opinion. They constituted threats that the employer would use his superior economic position in a manner made illegal by the Act. That such direct acts of coercion are illegal, even though vocal in form, is established by the Supreme Court's express reminder, in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477, that "in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways."

Point II

The Board's order is wholly valid and proper under the Act

The cease and desist provisions of the Board's order (R. 47–48) are mandatory under Section 10 (c) of the Act. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. Paragraph 1 (d) of the order, which directs respondent to cease and desist from "in any other manner interfering with, restraining, or coercing its employees" in the exercise of their rights under Section 7 of the Act (R. 47), is warranted in view of respondent's independent violations of Sec-

tion 8 (1) (*supra*, pp. 15–18), as well as its violation of Section 8 (2). *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426; *N. L. R. B.* v. *Pacific Gas and Electric Co.*, 118 F. (2d) 780, 789–791 (C. C. A. 9); *American Smelting & Refining Co.* v. *N. L. R. B.*, 128 F. (2d) 345 (C. C. A. 5); *N. L. R. B.* v. *Germain Seed & Plant Co.*, 134 F. (2d) 94 (C. C. A. 9).

The propriety of the provisions requiring respondent to disestablish the Alliance and withdraw recognition from it, and to post appropriate notices, are well established.

CONCLUSION

It is respectfully submitted that the National Labor Relations Act is applicable to respondent, that the Board's findings are supported by substantial evidence, that its order is wholly valid and proper, and that a decree should issue enforcing the order in full as prayed in the Board's petition.

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JUNE 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person

to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 10383.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THOMPSON PRODUCTS, INC.,

Respondent.

BRIEF FOR RESPONDENT THOMPSON PRODUCTS, INC.

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No. 10383

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THOMPSON PRODUCTS, INC.,

Respondent.

BRIEF FOR RESPONDENT THOMPSON PRODUCTS, INC.

Jurisdiction.

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent pursuant to Section 10(c) of the National Labor Relations Act [49 Stat. 449 (1935), 29 U. S. C. Secs. 151-166 (Supp. II, 1936)]. The jurisdiction of this Court is based upon Section 10(e) of the Act. Respondent is an Ohio corporation having its principal place of business in Cleveland, Ohio, and with industrial plants in Cleveland, Ohio; Detroit, Michigan; and Bell, California. This proceeding involves only the Bell, California, plant where the alleged unfair practices are asserted to have occurred.

The decision and order of the Board (46 N. L. R. B. No. 64) is set forth at pages 46-49 of the record, the intermediate report of the trial examiner is set forth at pages 50-79 of the record, and the amended complaint of the Board and respondent's answer thereto are set forth at pages 32-38 and 28-30, respectively, of the record.

Statement of the Case.

On December 31, 1942, the Board issued its Decision Findings of Fact, Conclusions of Law, and Order [46 N. L. R. B. No. 64, R. 46-49]. Its Findings and Conclusions may be briefly summarized as follows: Respondent dominated and interfered with the formation and administration of Pacific Motor Parts Workers Alliance (hereinafter referred to as Alliance), and contributed support to it, and by these and other acts, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby violated Sections 8(1) and (2) of the Act. The Board ordered respondent to cease and desist from dominating and interfering with the administration of or contributing financial or other support to the Alliance or any other labor organization, from recognizing the Alliance or giving effect to the collective bargaining between the Alliance and respondent, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bar-

gaining or other mutual aid and protection, as guaranteed in Section 7 of the Act. The Board further ordered respondent to withdraw all recognition from and completely disestablish the Alliance, and post appropriate notices.

On March 10th, 1943, the Board filed with this Court its petition for enforcement of its order [R. 81-85]. On March 17, 1943, respondent filed its answer to the petition [R. 89-92]. In said answer, respondent challenges the sufficiency of the evidence to support the Board's above mentioned Findings and Conclusions and questions the propriety of the Board's Order.

Respondent does not question the applicability of the National Labor Relations Act to its operations or the jurisdiction of the Board over respondent.

The pertinent provisions of the National Labor Relations Act are set forth in Appendix "A", *infra,* p. 41.

ARGUMENT.

I.

The Petition for Enforcement Must Be Denied Under the National Labor Relations Board Appropriation Act, 1944, Which Stabilizes Bargaining Relations for the Duration.

The Board has found that the Alliance was a company-dominated union, and has, therefore, ordered the respondent to disestablish it, to cease bargaining with or recognizing it or giving effect to the contract with it. Although, we submit, the Board's findings and conclusions are not supported by substantial evidence, even if we assume for purposes of argument that the Board's findings, conclusions, and order were in every respect valid when issued, the petition for enforcement must be denied. Under a recent enactment of Congress, existing collective bargaining representatives are not to be disturbed by the Board unless a complaint is filed within three months of the execution of a labor agreement, which was not done in the instant case.

By the National Labor Relations Board Appropriation Act, 1944 (Title IV, Labor-Federal Security Appropriation Act, 1944, Pub. 135, Chpt. 221, 78th Cong. 1st Sess., H. R. 2935), approved July 12, 1943, Congress made appropriations to meet the expenses of the Board for the fiscal year ending June 30, 1944, and in so doing provided as follows:

> "* * * No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: *Provided,* That, hereafter, notice of such agree-

ment shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person."

The above provision was precipitated by the action of the Board in issuing a complaint, at the instigation of the CIO, against Henry J. Kaiser's Portland, Oregon, shipyard to set aside his AFL contract on the ground it is invalid because the AFL was not the duly selected representative of his employees at the time the contract was entered into (11 Lab. Rel. Rep. 354, 498, 598). The purpose of the above provision was, in the words of Senator Bridges, "to stabilize labor differences during this critical wartime" (89 Cong. Rec. 6648). This was to be accomplished by freezing collective bargaining relations for the duration of the war and thereby prevent, during these critical times, the interference with production which invariably follows N. L. R. B. intervention in attacking the validity of collective bargaining agreements or in holding elections. Congress, therefore, took away from the Board jurisdiction to disturb existing union-employer collective bargaining relationships. For the convenience of the Court in Appendix "B", *infra*, page 46, we briefly discuss the legislative history of this provision with pertinent quotations from the statements of the legislators relative to its purpose and effect.

Though Congress did not directly amend the National Labor Relations Act because the provision was to be effective only for the duration, there can be no doubt that Congress by the specification in the Appropriation Bill did remove all jurisdiction from the Board to take any action

affecting established (for more than three months) collective bargaining relationships. Thus, the Congressmen who opposed the measure did so because, in the words of Senator Wagner, the author of the National Labor Relations Act, it "would practically repeal the Labor Relations Act" (89 Cong. Rec. 7104).[1] Senator McCarran, who was in charge of the Bill in the Senate, explained the purpose of the provision as follows (89 Cong. Rec. 7103):

> ". . . We believe that when agreements are now in existence, regardless of whom the agreements may favor, the agreements should be frozen, if I may use that term, or at least stabilized for the duration of the war, and not disrupted by confusion, misunderstanding, elections, or what not."

In the instant proceeding the Board seeks to disestablish the Alliance and to nullify its contract with the respondent. That collective bargaining agreement [R. 188-208], which is effective for one year subject to automatic renewal from year to year thereafter unless terminated by a written notice thirty days prior to an anniversary date, was entered into on November 10, 1941. No charge against the Alliance, the respondent, or this contract was filed until May 1, 1942 [R. 1116], on which date the United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (hereinafter referred to as the Union) filed its initial charge with the Board. The Board did not issue its complaint against respondent until August 28, 1942 [R. 3-7], more than nine months after execution of the agreement. Under such circumstances, in view of

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[1] "It would virtually repeal the Wagner Act and would not stabilize anything" (Senator Truman, 89 Cong. Rec. 7103). "The pending amendment would virtually repeal or nullify the Wagner Act, so far as the organizing of the men, or the right of men to vote for their collective-bargaining agents is concerned" (Senator Reed, 89 Cong. Rec. 7104).

the provisions of the National Labor Relations Board Appropriation Act, 1944, the Board has no jurisdiction to continue with this proceeding against respondent, engaged in vital aircraft parts production, and the same must be dismissed.

There can be no question but that this Act applies to pending cases. Thus, it was designed to require a dismissal of the Kaiser case, in which hearings were held by the Board many months ago. The Board has just recently issued to the parties in that case an order to show cause why it should not be dismissed under this new Act.

Furthermore, there is no doubt (notwithstanding the Board's *present* assertions to the contrary) that the Act removes jurisdiction from the Board to upset existing collective bargaining agreements, even though the union involved is an illegal, company-dominated union. Robert B. Watts, general counsel of the Board, in instructions to the Board's staff has just given the following interpretation of the effect of the amendment to the Appropriations Act in proceedings involving allegedly company-dominated unions (12 Lab. Rel. Rep. 805, 806):

> "*3. 8(2) Cases.* Cases involving domination or interference with the formation or administration of a labor organization, regardless of the existence of an agreement with the allegedly illegal organization are not covered by the amendment. In such cases the Board will proceed in all respects as before and will issue its normal 8(2) order."

There is absolutely no merit whatsoever in the position taken by the Board's counsel. On the contrary, until the promulgation of this interpretation it was conceded by everyone, *including the Board itself,* that the effect of the

Act was to prevent the upsetting of existing labor agreements, whether they were with a company-dominated union, the AFL, the CIO, or an independent union. We submit that the Act does prevent proceedings to set aside contracts with allegedly company-dominated unions, for the following reasons:

(1) The Act prohibits disturbing an "agreement between management and labor". The Act does not limit its prohibition to contracts with the AFL or the CIO or with unions which are the representatives of the employees under Section 9(a) of the National Labor Relations Act. There can be no doubt but that the contract between the respondent and the Alliance was a contract between management and labor. The Board's complaint herein alleged [R. 5] and our answer admitted [R. 29] that "the Alliance is a labor organization as defined in Section 2, subdivision (5) of the [National Labor Relations] Act." Certainly. therefore, respondent's contract with the Alliance was a contract with "labor". The Act is clear and unambiguous and any attempt to read an exception into the Act which is not expressed therein is clearly unwarranted.

(2) The purpose of the amendment to the Appropriations Act was to prevent the Board from disturbing existing labor agreements so as to avoid interference with production. Production is interfered with by Board intervention just as much when the union is a company-dominated union as when the union is a nationally affiliated union free from employer domination. Congress fully recognized that for the duration of the war it was removing employee protection under the Wagner Act, but it did so be-

cause it appreciated that in this critical period all-out production was more vital than the protection of such rights.

(3) In the discussions of the Bill on the floor of Congress, not a single word was uttered by any Congressman even indicating that contracts with company-dominated unions would not come within the scope of the provision. On the contrary, the comments of all the Congressmen were to the effect that the provision would apply to *all* contracts with *any* union.

(4) On June 17, 1943, the day after the House amended the Appropriations Bill to include the prohibition against upsetting existing labor relations, the Board issued a statement opposing this amendment in which it said in part (12 Lab. Rel. Rep. 595, 596):

> "Under the terms of the amendment *no contract, regardless of whether made with a completely company-dominated union,* or made with other unions as a result of collusion, fraud, or duress,—and completely regardless of whether the contracting union has any members whatever among the employees affected—can any longer be challenged if it has been in effect three months." (Italics supplied.)

The Board correctly interpreted the effect of the House amendment which was passed by Congress in the identical language.

(5) Senator Wagner opposed in the Senate approval of the House amendment on the ground that it would prevent the setting aside of contracts with

company-dominated unions. Thus he stated (89 Cong. Rec. 7104):

> ". . . We passed the Labor Relations Act because we wanted to do away with company unions. No one objects to that, but what is proposed here will in effect authorize a company union."

(6) The amendment was expressly designed to require a dismissal of the Kaiser proceeding. Yet in the Board's complaint against the Kaiser Company, it was alleged not only that the AFL union involved did not represent a majority of the employees when the contract was entered into, but also that the contract was invalid because the company had given illegal assistance to the AFL (11 Lab. Rel. Rep. 354).

By its clear and express language the Appropriation Act prohibits interference with contracts with any labor union, whether company-dominated or not, and we have been unable to discover anything indicating the intent of Congress was otherwise.

We submit that as a result of this recent Act of Congress, even if we assume that the Board's findings, conclusions, and order were valid in their entirety when issued, the Board's petition for enforcement must be dismissed.

II.

The Board's Findings of Fact Are Not Supported by Substantial Evidence and the Board's Order Is Improper and Illegal.

A. Alleged Domination and Support of the Alliance.

1. Formation of the Alliance.

Preliminary to discussing the evidence we wish to point out that though the Alliance was formed in August, 1937, no charge was filed with the Board asserting it was a company-dominated union until May 1, 1942 [R. 1116]. We submit that where there is such an unreasonable delay of almost five years in challenging the validity of a union as a bargaining agent, under the sound equitable doctrine of laches the Board should not have entertained the charge, and that it abused its power in failing to dismiss the proceeding on respondent's written motion [R. 27-28] which was based on the unfairness in requiring it to defend itself on such stale charges. This Court should refuse to enforce the Board's order on the same ground. This is particularly true where, as here, when the Alliance was formed the CIO—charging union was active in the plant and made at that time an investigation to determine whether there was any basis for a charge of company domination and concluded there was not [R. 776-779, 1231-1232].

Aside from the delay in filing the charge, we submit that the Court should deny enforcement of the Board's order because the Board's findings are not sustained by substantial evidence and the order is improper even on the facts as found. In its brief, the petitioner refers to certain alleged conversations between respondent's officers and supervisory employees relative to the organization of

an inside union. Such conversations cannot, of course, have interfered in any way with the rights of the production employees under the Act, so while we believe the evidence does not support the findings relative to them, there is no necessity of answering the argument in petitioner's brief so far as it relates to such matters.

The alleged company domination in the formation of the Alliance is asserted to have occurred under the following circumstances: Respondent's manager Dachtler instructed the assistant manager Victor Kangas to have an employee join the union to report on its activities; Kangas had an employee Porter carry out these instructions; Livingstone, respondent's personnel director, through Kangas, had Porter talk a group of employees into coming into Livingstone's office and request permission to form an inside union and make certain demands for improved working conditions; Livingstone dictated to Kangas the wording for the inside union's application cards; Kangas had the cards printed, and on Kangas' instructions Porter picked them up from the printer on company time. As Porter was not a supervisory employee [R. 408], the basis of the Board's order is that Porter engaged in the above described activity at the request of the respondent. We submit that there is no substantial evidence that Porter engaged in such activity or, if he did, that he did so at the request of respondent. Finally, in any event, assuming the facts were as found, as a matter of law this did not amount to domination of the Alliance.

The findings as to the alleged activity of Porter were based primarily on the testimony of Porter and in part on the testimony of Kangas. In view of the fact that the testimony of these two witnesses was utterly worthless and the evidence to the contrary was overwhelming, there

was no substantial evidence to support the Board's findings. Kangas and Porter were very close friends [R. 321, 441]; they were both hostile to respondent and pro-CIO, Porter being a member of the Union. Kangas had been discharged by the respondent prior to the Board's hearing, and Porter's employment had been terminated under unusual circumstances hereinafter detailed. These two men were out "to get" the respondent, and the record clearly demonstrates that their testimony was a "cooked-up" story to aid the union and hinder the respondent. We will consider separately the testimony of these two witnesses.

Porter. The testimony of Porter was utterly worthless and entitled to no credibility. We fully recognize the right of the Board to resolve the conflicts in testimony and make the findings of fact, but we submit that the testimony of Porter could not as a matter of law constitute substantial evidence for the following reasons:

(1) Porter was strongly pro-CIO. He joined the union in April, 1942 [R. 274], reported to the Board in the same month as to his alleged activities in organizing the Alliance in 1937 [R. 289], and the union filed its charge with the Board on May 1, 1942!

(2) Porter was likewise hostile to the respondent. This is clearly shown by his testimony as a whole.

(3) Porter left respondent's employ under circumstances which clearly reflect on his trustworthiness and credibility. In July of 1942, Porter reported to the F.B.I. that he had found emory dust in his machine. After an agent of the F.B.I. investigated Porter's machine, he had a private conference with

Porter who immediately thereafter quit respondent's employ in such haste that he wouldn't wait ten minutes for his check and walked out of the plant with the F.B.I. agent after him [R. 1169, 1171-1173, 1195-1196]. About the same time the CIO had reported to the War Production Board that respondent was not making full use of its machines, a report which upon investigation by the W.P.B. proved untrue [R. 580-581, 1202-1203]. The Porter-F.B.I. incident apparently was part of a CIO attempt to discredit the respondent, an attempt which back-fired.

(4) Porter's testimony as a whole shows that he was a weak, halting and unconvincing witness. He was inconsistent, repeatedly contradicted himself, and much of his story was inherently improbable. We can only refer herein to a few of the many instances in Porter's own testimony which demonstrated his complete unreliability. Thus, Porter testified that he overheard Livingstone dictate to Kangas on July 26, 1943 the wording to be printed on the inside union's application cards, which included the name Pacific Parts Workers Alliance [R. 277], and yet he further testified that at an alleged private meeting with Livingstone a few days later, Livingstone asked what the name of the inside union was going to be [R. 247]! He further testified that in 1937 he heard no comments about the possibility of respondent going out of business [R. 280]; yet when he was being pressed on cross-examination to state why he sought to organize an inside union he stated that one of the reasons was the possibility, which had been reported to him, that the plant might close [R. 293]! Although Kangas, according to Porter, told Porter

that Livingstone wished to see him at the Jonathan Club but did not tell him what for [R. 300-301], when Porter arrived at that meeting (which was the one where Porter was allegedly requested to encourage the formation of an independent union), Dachtler asked him if he knew what he was there for, and Porter replied that he did [R. 215]!

(5) Though the Board's findings rest exclusively on the testimony of Porter and Kangas, and they told the same story *in general,* that is, that Porter was instructed to and did encourage the employees to form an inside union, they contradicted each other more often than not as to the *details* of this alleged plot. Thus Kangas testified he asked Porter in 1937 to join the union to report on its activities [R. 373-374]; Porter testified Kangas did not [R. 331]. Porter testified that when Livingstone asked him to undertake his alleged activities, he was promised all sorts of unbelievable privileges and remuneration but that he was not particularly interested in such promises [R. 286-289] (!) and that when respondent allegedly gave him $50.00 through Kangas for this activity he thanked him for it [R. 251]. Yet, according to Kangas, when Porter was allegedly handed the $50.00, Porter cussed out respondent's manager in vile language because he felt the sum was so inadequate [R. 406].

This incident of the alleged payment of $50.00 to Porter was alone sufficient to completely discredit the testimony of both Kangas and Porter. Thus according to Porter, he was promised special favors and remuneration in July, 1937, and in September, 1937, Kangas handed him the $50.00 at Porter's

home in the presence of Mrs. Kangas and Mrs. Porter, stating it was from Hileman, respondent's general manager at that time [R. 249-251, 322-324]. According to Kangas it was in August or September of 1938 (this date is significant, as we shall see), "over a year after the Alliance had been formed" [R. 402], that Hileman gave him an envelope for Porter "for reimbursement for his efforts in organizing the independent union" [R. 403]; he immediately thereafter gave Porter the envelope in the wash room [R. 404-405; and Kangas "did not at that time know what was in the envelope" [R. 405], but learned that evening at Porter's house when he cussed Hileman out [R. 405-406]. As we will hereinafter point out, the record establishes conclusively that the only sum Porter was paid was the amount of $40.00 in July of 1938 for special work investigating a theft at the plant.

(6) In addition to being contradicted by Kangas, Porter was contradicted by a number of reliable witnesses and by unimpeachable documentary evidence and was corroborated by no witness other than Kangas. Thus, though Porter testified he joined the Union in 1937 to report on its activities, Runyan, who was at that time the principal organizer for the Union and was not an employee of respondent at the time of the hearing [R. 771-773], testified that Porter did not join the Union and that he had personally checked the Union's application cards [R. 779-780]. Porter testified that he attended the first meeting of the employees at an electric shop to organize an independent union [R. 237], though all the other witnesses who attended that meeting, includ-

ing Bebb who was the chairman [R. 666-667]; Pfankuch [R. 786] and Creek [R. 1134], no longer an employee, testified that Porter was not present. According to Porter it was he who talked the 15 or 20 employees into going into the meeting with Livingstone, though Wayne Kangas, Victor Kangas' brother [R. 792], testified that it was not Porter who got him to go into that meeting [R. 811], and Stubblefield testified that he was the one who got the employees together [R. 802-803].

Porter's testimony covering the printing of the Alliance's membership cards by itself establishes that no impartial trier of fact could give any credence to Porter's testimony. There is no conflict in the testimony to the effect that Porter, as a "messenger boy" [R. 1134], picked up the cards from the printer. However, Porter's additional testimony relating to the cards completely discredited him. Thus, he testified that he left the plant at about eleven in the morning for about half an hour to pick up the cards and did so on company time [R. 229-230] and, according to Kangas, Porter was back at the plant during the noon hour [R. 355]. Yet his time card for the two week period discloses that he took less than thirty minutes for lunch on each day except on July 27, 1937, the day during which according to Porter he picked up the cards, when he punched out at noon for an hour and 22 minutes [R. 760]. When asked where he got the money for the cards Porter first replied that "someone of the ups gave me the money" [R. 230-231; stricken]; then that Kangas or Hodges gave him the money [R. 231]; later that he couldn't remember where he got it [R. 277]; and finally that he

had "never been able to figure out" who gave him the money for the cards [R. 332]! He was certain, however, of two things: first, that he did not pay for the cards out of his own pocket [R. 231, 332, 333] and, secondly, that the Alliance never reimbursed him for payment for the cards [R. 231, 277-278]. Yet several witnesses testified that as employees interested in forming an inside union they donated sums to pay for printing of the cards [R. 798, 803] and the Alliance produced at the hearing a statement signed by Porter requesting reimbursement for the cards and the Alliance's cancelled check made out to and endorsed by Porter in payment for the cards [R. 1122-1123, 1127-1128]!

The record is full of such inconsistent and unreliable testimony on the part of Porter, and his testimony was contradicted by a number of other witnesses and corroborated by none except Kangas, whom we will now consider.

Kangas. The testimony of Victor Kangas, like that of Porter, was not entitled to any credit, and no impartial trier of fact would have placed any reliance upon his testimony.

(1) Kangas was for the CIO from the very beginning. According to uncontradicted testimony, in May of 1937 Kangas asked at least one employee to join the CIO and to get others to do so. He stated he was concerned about his job and if the CIO would stand behind him he would stand behind the CIO [R. 747-748].

(2) Kangas was also extremely hostile to the respondent. His work was unsatisfactory to the man-

agement [R. 1186-1189] and he was discharged in 1940, or, in the words of Kangas himself [R. 464], "I just beat them before the ink got dry; I understand the skids were greased for me, and I quit before it happened." Thereafter, Kangas threatened "to get" Hileman, respondent's manager, and to put respondent out of business [R. 1190], and made efforts to do so [R. 1200-1203].

(3) In January of 1941, after he had been discharged, Kangas sought to discredit the local management of respondent by sending a malicious and false telegram to the respondent's personnel director in Cleveland [R. 1215-1218]. Kangas, of course, denied that he sent any such wire [R. 481-482]. However, by his own testimony he indirectly admitted his guilt. Thus, when asked for specimens of his handwriting, Kangas freely gave a specimen of longhand and printing with small letters [R. 478, 1212]. He balked, however, when asked to give a specimen of his printing in capital letters [R. 478-479]. The wire which he handed to the telegraph office was printed in capital letters [R. 1216]! The record establishes beyond question by the testimony of an expert examiner of questioned documents [R. 1219-1220] and by other evidence that Kangas in fact sent the wire [R. 1203-1218].

(4) Kangas' testimony as a whole was unconvincing, was full of inconsistencies and inherent improbabilities. Thus, though according to Kangas the nefarious scheme which Livingstone allegedly concocted to have Porter organize an inside union required the greatest secrecy, Kangas talked to Por-

ter a number of times giving him instructions and on each occasion this was at Porter's machine [R. 443] right in the plant within five feet of a drinking fountain [R. 1155-1156]! According to Kangas, in July, 1937, Livingstone one afternoon and again in the same evening asked him to suggest the name of an employee to initiate the organization of an inside union [R. 338]. The second time Kangas replied that he could not think of anyone at the moment [R. [343] though in June of 1937, according to Kangas, he had selected Porter to join the CIO to engage in espionage and Porter was the employee he allegedly suggested to Livingstone the next day! The record is full of such unbelievable statements on the part of Kangas.

(5) As heretofore pointed out, with some examples, in most essential particulars Kangas' testimony was in conflict with that of the Board's star witness, Porter.

(6) Likewise, as in the case of Porter, Kangas' testimony was contradicted by numerous other witnesses and was corroborated by none, excepting Porter. Thus Kangas testified he attended the meeting in July, 1937 between Livingstone and 15 or 20 employees who sought to organize an inside union [R. 360], though, aside from Porter, the other witnesses, including Kangas' brother, who attended that meeting testified that Kangas was not present [R. 796, 807, 1243]. Kangas testified that Porter was not paid for the work he did investigating a theft in 1938 [R. 471], though he stated he gave Porter $50.00 in an envelope from Hileman in August or

September of 1938 for his alleged part in organizing the independent in 1937. Not only did Livingstone deny that he ever asked Porter to initiate an independent union movement or promise to pay him any money [R. 1236-1241] and Hileman denied that he gave any money to Kangas for Porter for any such purpose [R. 1180-1181], but the record establishes beyond question that Porter was paid $40.00 in July of 1938 for the theft investigation [R. 762-766], and the fact that Kangas had knowledge of this payment was established not only by the testimony of Hileman [R. 1181] but by the expense voucher which was approved in writing by Kangas [R. 764-766]! Time will not permit a specific reference to the numerous other instances in which Kangas' story was contradicted by unimpeachable evidence.

We submit that the evidence contradicting the tale of Kangas and Porter was so overwhelming and those two witnesses were so completely discredited that no impartial trier of facts could find that Porter was solicited by respondent's management to initiate an independent union movement or that he was active in the formation of the Alliance. The only explanation of the Board's findings is that the trial examiner was biased and prejudiced against respondent and the Alliance and that the Board, which is hostile to inside unions,[2] merely adopted his findings with-

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[2]"In regard to independent unions, the National Labor Relations Board has consistently pursued a policy aimed at the extermination of these nationally unaffiliated organizations.

"* * *

"That the Board strains every sinew to find company domination of independent organizations is demonstrated by the *International Shoe Co.* case. . . ." *Final Report of the Special Committee of the House of Representatives, 76th Congress, 1st. Session, Appointed Pursuant to H. Res. 258 to Investigate the National Labor Relations Board,* December 28, 1940, in Vol. 4 Bureau of National Affairs, Verbatim Record of the Proceedings, p. 445, at pp. 473, 474."

out an impartial reexamination of the evidence. This circumstance is very material in determining whether there was substantial evidence to support the findings.

At the hearing the Board began its case with the witnesses Porter and Kangas. We believe the record establishes that at the conclusion of their testimony the examiner already had his mind made up. Thus he cross-examined the witnesses of the Alliance and the respondent to break down the conflict in their testimony with that of Porter and Kangas. An appreciation of the trial examiner's lack of impartial attitude can only be obtained by reading the record as a whole. We refer, however, to two illustrative incidents. Respondent produced the "minutes" [R. 1252-1253, 1300-1302] of the meeting between the group of employees and Livingstone on July 26, 1937, which Livingstone dictated [R. 1246-1252, 1277]. Because Porter and Kangas had testified that this meeting was held on July 27, 1937, the examiner became disturbed as the minutes recited the meeting occurred on July 26 [R. 1248]. Though the original and copies of the minutes from the files of both respondent and the Alliance were produced [R. 1253, 1300-1302], the trial examiner simply would not accept the fact that Porter and Kangas were in error and sought to break down the reliability of the minutes by cross-examining Livingstone to establish there was no reason for the minutes to have recited therein that they were "minutes" of the meeting [R. 1249, 1281-1283]! Similarly, when the Board's witness Bebb, one of the leaders in the formation of the Alliance, voluntarily stated his indignation at the interruption with respondent's vital war work resulting from this proceeding, the trial examiner immediately jumped to the erroneous conclusion that the respondent had put the witness up to making the statement

and sought to get such a "confession" from the witness [R. 674-677]. For the convenience of the Board, we are printing as Appendix "C", *infra*, page 52, that portion of the record involving this incident including the cross-examination by the trial examiner.

With reference to our comments on the examiner's cross-examination we should point out that,

> "We do not mean that an examiner is not free to, and should, interrogate witnesses when necessary to elicit or clarify testimony. What we do mean is that, when he does interrogate, he should do so as an impartial participant and not as an advocate endeavoring to establish one side or the other of the controversy before him.
>
> "This record is full of instances of hostile and searching examination of witnesses who might be expected to be favorable to the company or the intervener while similar action does not appear as to witnesses favorable to the complainant."
>
> *Montgomery Ward & Co. v. National Labor Relations Board,* 103 F. (2d) 147, 156 (C. C. A. 8th, 1939).

The trial examiner's bias and prejudice is also clearly shown by his intermediate report. Therein he made an ineffective attempt to whitewash Kangas and Porter [R. 56, note 7], referring only to a small part of the evidence relating to their credibility and making an unsatisfactory explanation even of this impeaching evidence. He further misstated the evidence and made comments directly contrary to the record. Thus he found [R. 56] that Kangas instructed Porter to join the CIO and that Porter did so. He comments that Kangas' and Porter's testimony as to this assignment was uncontradicted, though he fails

to note that Porter testified that it was not Kangas who so instructed him and he completely overlooked the unimpeachable evidence that the CIO records disclosed that Porter had apparently not even applied for membership in 1937 [R. 779-780]. He further finds [R. 61-62] that the meeting of Livingstone and the employees was on July 27, 1943 (since otherwise Porter's tale of events would not have hung together), though to do so he had to disregard the only reliable evidence—the minutes of the meeting—which fixed the date as July 26, 1937. He did so on the unsatisfactory ground that "Livingstone gave no reasonable explanation as to why he used the term 'minutes' to characterize an informal interview," concluded "that the document was not prepared, as Livingstone testified, immediately after the meeting," and "place(d) no reliance upon it," notwithstanding the fact that respondent produced the original from its files [R. 1277, 1301-1302], and the Alliance produced a copy from its records [R. 1249-1253]. The trial examiner further commented that the stenographer who took the dictation from Livingstone of these minutes (and who was not an employee of respondent at the time of the hearing [R. 1308]) in her testimony "admitted that she could not recall when [the date?] the dictation was made," and significantly overlooked her positive testimony in corroboration of Livingstone's [R. 1277] that the dictation was on the same day as the meeting [R. 1309-1310].

There is no need to further discuss the examiner's intermediate report. It is certain that he could not have made the findings, statements, or comments therein or have been so partisan in cross-examining witnesses if he had considered the case with the impartial mind required of a fair trier of fact. Under similar circum-

stances the courts have refused to enforce the Board's orders. *Inland Steel Co. v. National Labor Relations Board,* 109 F. (2d) 9 (C. C. A. 7th, 1940); *National Labor Relations Board v. Washington Dehydrated Food Co.,* 118 F. (2d) 980 (C. C. A. 9th, 1941).

In view of the utter worthlessness of the testimony of Porter and Kangas, the overwhelming weight of the evidence to the contrary, the bias and prejudice of the trial examiner, and the five year delay in the filing of the charge with the Board—a delay which necessarily made it difficult for respondent to present evidence—, the evidence on which the findings of the Board are based is not substantial. It cannot be true that merely because one witness, such as Porter, testifies to an alleged fact, that evidence must be regarded substantial enough to support a Board finding no matter how convincing and overwhelming the evidence to the contrary is and no matter how certainly the record establishes that the witness perjured himself. Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *National Labor Relations Board v. Columbian Enameling & Stamping Co.,* 306 U. S. 292, 300, 59 Sup. Ct. 501, 505 (1939). "Where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury'." *Pennsylvania R. R. v. Chamberlain,* 288 U. S. 333, 343, 53 Sup. Ct. 391, 395 (1933). We submit that no reasonable person could accept the tale of Porter and that the evidence was "so

overwhelming" in conflict with his story, that the Board's findings cannot be sustained.

A recent case, very similar in several essential respects to the instant case, sustains completely our position. In *National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co.,* 135 F. (2d) 15 (C. C. A. 3rd, 1943), the company was accused of engaging in espionage and the Board's star witness, one Campbell, a member of the CIO, claimed he had organized the inside union involved at the request of the management. Unlike the instant case, this union was formed as a result of petitions circulated on company time, in part by minor supervisory employees, and the organizational committee meeting was held on company time and property. The inside union was formed during a CIO membership drive, and shortly thereafter a consent election was held by the Board between the inside union and the CIO union, which was won by the independent union. Three years later the CIO filed a charge that the inside union was company dominated. The Board sustained this charge, primarily on the basis of Campbell's testimony, but the court refused to enforce its order.

We have already pointed out that in the instant case there was a five year delay in filing the charge challenging the validity of the Alliance notwithstanding the fact that the CIO at the time of its formation made an investigation and satisfied itself that the Alliance was not assisted by respondent in its organization [R. 776-779, 1231-1232]. No election was held at that time to determine bargaining rights because the CIO concluded it did not have enough supporters to warrant petitioning the Board for an election [Tr. 632]. Under such circum-

stances the following comments by the court in the *Sun Shipbuilding Company* case are equally applicable here (pp. 22-23).

> ". . . The fact that the [CIO] union then voluntarily entered upon the election and for three years thereafter acquiesced in the result only serves to confirm what the record, up to this point, indisputably shows, viz, that there was no substantial evidence of employer domination or interference in the formation of the Association."

That court's comments relative to the effect of the testimony of the Board's witness Campbell in that case are pertinent when considering Porter's testimony herein [p. 25]:

> ". . . However, in determining whether the evidence which the Board accredits is such 'as a reasonable mind might accept as adequate to support a conclusion', it is not wholly without significance that the integrity of the principal witness relied upon by the Board was self-impeached, that he had a bias or interest to serve for which both the Examiner and the Board felt constrained to make allowance in appraising his testimony, and that the Board itself disregarded material portions of his testimony on certain issues when directly refuted."

In view of Porter's attempt at first to make it appear that the respondent herein had paid for the Alliance's membership cards, his final statement that he did not know who paid for the cards though he knew it was not the Alliance, and the conclusive evidence that the Alliance did pay him for the cards, *supra,* pp. 17-18, the following

comments of the court relative to Campbell's alleged activities are particularly significant [pp. 25-26]:

> "In support of the charges that the company dominated and interfered with the formation of the Association, Campbell had testified to a number of matters calculated to show that the company . . . had paid for the membership cards of the Association . . .
>
> "Even accepting that Campbell's admission on cross-examination that the membership cards had been paid for by the Association atoned in a measure for his earlier implication to the contrary, the fact remains that the plain intendment and only purpose of his direct testimony in such regard had been to make it appear that the company had underwritten the cost of the membership cards,—an implication which was disingenuous, to say the least, when he knew, as he admitted on cross-examination a little later, that the cards had been paid for by the Assotion . . ."

The court concluded its comments concerning Campbell's testimony with a statement directly applicable herein (p. 29):

> "In the light of the foregoing, we deem it unnecessary to review in further detail the remaining matters testified to by Campbell, all of which involve his own personal and, ofttimes, secret conduct of as long ago as four years before the hearing at which, for the first time, he revealed the character and extent of his allegations and for which he would now make the company responsible on the basis of his alleged collusive understanding and arrangement with the respondent. The fact that from the very nature of the evident situation an answer in detail to the

> evidence so advanced is difficult and, at times, impossible should not be availed of as inferential confirmation that the testimony is substantial. Especially in such circumstances, the inherent probative value of the testimony remains a question of primary concern."

Notwithstanding the efforts of Kangas and Porter to build a case against respondent, the evidence establishes that Porter had no significant part in the organization of the Alliance and that the independent was formed free from employer domination or control.

The CIO had been active at respondent's plant prior to the time that respondent purchased it in April of 1937. For some time *prior* to Livingstone's visit to the plant, as found by the trial examiner [R. 55], the employees discussed the possibility of forming an inside union [R. 662-663, 775-776, 784, 792-793]. In fact, according to Wayne Kangas, Victor Kangas' brother, several days before the meeting between Livingstone and the fifteen or twenty employees (which was before Porter according to his own testimony had undertaken any activity relative to forming an inside union), a group of employees gathered together to see the management, but abandoned the effort at that time because not enough men were then assembled [R. 794-795]. That the independent union movement was well along its way before Porter took any action, is established by the uncontradicted testimony that about a week before Livingstone's meeting with the men, when employee McIntire asked Kangas about the efforts being made by the employees to form an inside union, Kangas replied that he wanted the CIO in and that, "We have got to get a move on, or this independent is going

to beat us" [R. 1072-1073]. Many of the men preferred an inside union because of the high initiation fees and dues of the national unions, they were afraid the national union might call a strike, and they desired to have their own people familiar with the shop conditions to bargain for them [R. 663, 774, 776].

About a week following the first abortive attempt of the employees to see the management, a second time the group got together and did then in fact have a meeting with Livingstone. This is the meeting Porter claims to have initiated, although other employees denied that Porter was responsible for getting the employees together [R. 811] and employee Stubblefield claimed credit for getting the employees together for that meeting [R. 803]. The employees at that meeting informed the management that they were organizing an inside union and asked if the company would bargain with them. They were advised that the company had the duty to recognize their union under the Wagner Act if they represented a majority of the employees, but that otherwise the company could have nothing to do with their movement and could not say a word about it [R. 796, 801, 1252-1253, 1300-1302]. They were cautioned however, not to solicit members on company time or property and not to coerce any employees into joining their union and they were refused the request to permit them to use some of the company's paper on the ground that that would be illegal [R. 664-665, 796-797, 801-802, 1252-1253, 1300-1302].

Following this meeting application cards for membership in the inside union were obtained and distributed. While the CIO was soliciting members on company time [R. 774] the employees distributing the cards for the

inside union did so outside the company gate [R. 651, 804] and the organizational meetings were held at a rented hall [R. 650]. A constitutional committee was appointed for the drafting of the Union's constitution and by-laws [R. 656-657] and at a meeting on August 3, 1937 the constitution was approved and signed by the employees present at that meeting constituting a majority of the employees [R. 107-109]. Thereafter the Alliance submitted to the management evidence in the form of application cards and its signed constitution that it represented the employees and asked for recognition [R. 1254-1255]. After checking the membership claims the respondent, being satisfied that the Alliance did represent the employees, recognized it and negotiated a contract with that union [R. 814-815, 1254-1255, 815-820, 122-129].

We submit that the record establishes without substantial conflict in the evidence that the Alliance was formed by the employees and without any suggestion or encouragement from respondent. However, even if Porter's tale were true, we submit that the Alliance was not formed in violation of the Wagner Act. Porter did not, of course, tell any of the employees that he was active in the organization of the inside union at the suggestion of the management [R. 238-239, 292, 297-298]. The employees had no knowledge of Porter's alleged instructions from respondent and they did not even recognize him as a leader in the inside union movement. Respondent did nothing to coerce the employees into joining an inside union, or even encourage them to do so. There was no testimony by Porter, Kangas, or anyone else, that any officer or supervisory employee of respondent said a single word to any of the employees to encourage them to join

an inside union. The only statement from management to the employees at this time relative to unions apparently was Kangas' advice to the men that they could belong to any union they wanted to and it was none of his business [R. 427].

There is no doubt that a majority of respondent's employees joined the Alliance of their own free and uncoerced will because they desired to be represented by an independent union. The employees, according to the CIO organizer at that time, were very slow in coming into the CIO and early in the fall of 1937 the CIO abandoned its attempt to organize the employees of respondent because, according to the business agent of the CIO, they did not want the CIO and "there was no use trying to force it on them" [R. 777].

We submit that not only is there no substantial evidence that Porter was instrumental in forming the Alliance, or if he was that he acted on instructions from respondent's management, but that even if we assume Porter's tale were true, respondent did not dominate or interfere with the formation of the Alliance since the employees formed and joined the Alliance solely because, without influence from respondent, they wanted an inside union. In concluding this discussion we wish to point out that the case of *National Labor Relations Board v. Germain Seed & Plant Co.*, 134 F. (2d) 94 (C. C. A. 9th, 1943), relied on by petitioner, is not pertinent to the instant case. Aside from other distinguishable factors, in the *Germain* case a supervisory employee not only suggested the formation of an inside union, but also called the employees together for two meetings to organize a union and at those meetings he spoke and made threats of company disfavor to those who joined the AFL.

2. Alleged Support of Alliance.

The petitioner claims that respondent gave support to the Alliance by permitting its executive committee to meet on company property and time. The only evidence as to such meetings on company time was the testimony of one witness that the meetings were held after the day shift went off, and that twice, in August and September or October of 1941, while he was working the swing shift he attended meetings after punching in [R. 565-568]. As soon as respondent's management received word of this [R. 1100, 1192-1193], the Alliance committee was advised in writing that it must hold its meetings on its own time [R. 1095-1096].

Secondly, petitioner complains that respondent permitted the Alliance to solicit members and collect dues on company time. While such activity did begin some months or years after the Alliance had been formed, the respondent sought to prevent it [R. 1010, 1093-1094, 1139, 1156].[3] In any event, from the very beginning [R. 774] the CIO continuously campaigned on company time without interference [R. 738-739, 744-745, 750]. Respondent tried to stop both organizations from using company time for union business, though it penalized no one for such interference with production. The result was that the Alliance "stopped [union activity on company time] just as long as the other organization [CIO] stopped when

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[3]Hileman readily admitted the statement referred to in the petitioner's brief in footnote 7, page 11 [R. 1186]. This incident occurred after respondent had knowledge that the CIO had filed its charge with the Board [R. 1116]. At this meeting, Hileman was extremely "burned up" [R. 616, 1174] because Smith and Spencer had been active in having the CIO make a complaint to the War Production Board that respondent was not making full-time use of all of its machines, an assertion which was untrue, as an inquiry would readily have shown [R. 584-587, 1167-1168, 1202-1203]. Notwithstanding this statement of Hileman's, CIO activity on company time continued unabated without interference from respondent.

they were cautioned" [R. 1145]. Since respondent was neutral in this connection, permitting (only by failing to discipline) the same activity by both organizations, it gave no unlawful support to either. *National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co.,* 135 F. (2d) 15, 21 (C. C. A. 3rd, 1943); *Ballston Stillwater Knitting Co. v. National Labor Relations Board,* 98 F. (2d) 758, 761 (C. C. A. 2d, 1938); *National Labor Relations Board v. Mathieson Alkali Works,* 114 F. (2d) 796, 801 (C. C. A. 4th, 1940). Petitioner recognizes that there is no illegal support given to one organization merely by permitting union activity on company time unless the company denies the same privilege to a competing organization. Thus, in its complaint [R. 35], petitioner alleged that respondent permitted the Alliance to use company time but denied this concession to the Union, an allegation which is not sustained by the record.

Nothing need be said about the incident when Hileman was consulted by Overlander (petitioner's brief, p. 11) relative to the resignation of the Alliance's president [R. 631-641, 1183-1198, 1189-1199] other than to point out that Baldwin, the one employee Hileman allegedly voiced an objection to as a successor president [R. 634], was in fact the one elected as president. Certainly this demonstrates that the respondent did not influence the employees' choice.

The facts in connection with the respondent's notice of October 23, 1941 [R. 555-556] asking certain supervisory employees to resign from the Alliance establish lack of domination of that organization rather than company domination. The contract between the respondent and the Alliance applied to all factory employees except those em-

ployed in a supervisory capacity [R. 165]. The parties believed that such supervisory employees were only those with the right to hire and fire. However, shortly before October, 1941, certain interpretations of the Wagner Act were issued, which came to the attention of both respondent and the Alliance, indicating that employees need not have the right to hire and fire to be considered supervisory employees representing management. In the light of these interpretations, the Alliance committee discussed the advisability of having certain employees ousted from the union and the matter was discussed at a union meeting. The Alliance's president then brought the matter up with respondent's personnel manager, and it was agreed between them that the employees involved would thereafter be considered as supervisory employees and the Alliance would no longer represent them and they should resign from the union, which they did [R. 555-556, 1105-1106, 1113-1114, 1138-1139, 1146-1150, 1152-1153]. Subsequently, at a meeting between respondent and the Alliance committee the Alliance representatives pointed out that one additional employee was then considered a supervisory employee and it was agreed to remove his rate from the contract [R. 942].

As a matter of fact the record in this proceeding does not establish that any of these so-called supervisory employees held positions which made it improper for them to be members of or to take an active part in the Alliance. *National Labor Relations Board v. Mathieson Alkali Works,* 114 F. (2d) 796 (C. C. A. 4th, 1940); *Magnolia Petroleum Co. v. National Labor Relations Board,* 112 F. (2d) 545 (C. C. A. 5th, 1940); *National Labor Relations Board v. Sparks-Withington Co.,* 119 F. (2d) 78

(C. C. A. 6th, 1941); *National Labor Relations Board v. Swank Products, Inc.*, 108 F. (2d) 872 (C. C. A. 3rd, 1939); *National Labor Relations Board v. Arma Corp.*, 122 F. (2d) 153 (C. C. A. 2nd, 1941). The respondent and the Alliance bent over backward to prevent any employer interference by having the employees named in the October, 1941 notice resign. Moreover, none of the employees therein named took any active part in the Alliance while they held such minor supervisory positions until almost a year after the Alliance was formed. Creek did not assume any supervisory duties until about June of 1938 when he had two men under him [R. 1090-1092]; Weisser did not assume any supervisory duties until the fall of 1940 [R. 1102]; Fickle was merely an experimental man in the tool department [R. 537, 1091].

Not only did the respondent not give illegal support to the Alliance, but it failed even to give it such permissible assistance as it could. At the very first meeting with the group of employees who sought to organize an inside union, the respondent refused to assist them even by allowing them to use some paper [R. 797, 801-802]. The first demand of the Alliance after it was organized was for a closed shop. Respondent refused this demand at that time [R. 815] and also when it was again made in 1939 [R. 852]. Similarly respondent refused the Alliance's request for a check off [R. 1055, 1059] and for lists of new employees [R. 1101]. Respondent disciplined the president of the Alliance with a ten day lay-off because he was late in returning to work from a vacation [R. 1150-1151, 1185-1186], and refused to reinstate employee Bright, who was discharged for not wearing his plant identification button, though being advised that on

the occasion he was at the plant seeking to dissuade some of the employees from attending a CIO meeting [R. 999-1008].

That the Alliance was free from employer domination is shown, we believe, by its accomplishments. It obtained contracts which compare favorably with contracts negotiated by national unions [R. 122-208]. The Alliance committee met at arms length with respondent's management and as they gained experience became more insistent on granting of their demands [*Cf.* R. 880-886]. An examination of the minutes of the meetings between respondent and the Alliance [R. 814-1070] will demonstrate beyond a shadow of doubt that the Alliance was properly representing the employees free from any control whatsoever by respondent.

We submit that there was no substantial evidence that the Alliance was formed in violation of the Act or that it at any time received illegal support from or was dominated by respondent. The Court should, therefore, refuse to enforce the Board's disestablishment order.

B. Alleged Interference, Restraint, and Coercion.

With one possible exception,[4] the statements allegedly made (petitioner's brief, pp. 15-17) by respondent to its employees were constitutionally permissible and did not amount to interference. *National Labor Relations Board v. Virginia Electric & Power Co.,* 314 U. S. 469, 62 S.

[4]The evidence does not support the assertion in petitioner's brief (page 16) that respondent's supervisory employees engaged in an "organized campaign" to dissuade Crank from joining the CIO. Crank first approached Millman about the matter, and so far as appears he may have begun the conversations in the other two instances testified to [R. 513-518]. Millman's comment is related in footnote 5, *infra.* When the incident referred to in the petitioner's brief, footnote 13, page 16, came to the attention of respondent's managers, immediate action was taken to see that no such occurrence would happen again [R. 1099, 1103-1104, 1111-1112].

Ct. 344 (1941); *National Labor Relations Board v. Citizens-News Co.,* 134 F. (2d) 962, 970 (C. C. A. 9th, 1943); *National Labor Relations Board v. Union Pacific Stages,* 99 F. (2d) 153, 178 (C. C. A. 9th, 1938); *Diamond T. Motor Car Co. v. National Labor Relations Board,* 119 F. (2d) 978, 982 (C. C. A. 7th, 1941); *Midland Steel Products Co. v. National Labor Relations Board,* 113 F. (2d) 800, 803-804 (C. C. A. 6th, 1940); *The Press Co. v. National Labor Relations Board,* 118 F. (2d) 937, 942 (C. A. D. C., 1940), cert. den. 313 U. S. 595, 61 S. Ct. 1118 (1941); *National Labor Relations Board v. American Tube Bending Co.,* 134 F. (2d) 993 (C. C. A. 2nd, 1943).

Certainly Smith's testimony [R. 577] that Millman stated respondent would close its plant rather than recognize the CIO does not amount to substantial evidence of interference.[5] Not only did Millman deny the statement [R. 1101-1102], but Smith's own testimony was of very little value in view of his testimony that while the Alliance was busy all over the plant on company time [R. 530-531] the CIO did nothing on company time [*Tr.* 433].[6] The record is clear that in fact the CIO did solicit members continuously on company time [R. 774, 738-739, 744-745, 750], and Smith's denial that he never did so

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[5]In contrast with Smith's testimony is that of Crank, a CIO member, who advised Millman that he was thinking of joining the Union. Millman's reply was that he felt Crank was wrong in his ideas about the matter, but that he couldn't say much more and Crank could make up his own mind [R. 514-515].

[6]Testimony of Smith at page 433, lines 8-15 of the Transcript (not reprinted in record):

"Q. You, of course, never discussed it on company time? A. As I recall I didn't.

Q. Or never tried to get anybody to join the CIO on company time A. I believe not.

Q. Or never saw any other CIO member try to get anybody to join on company time? A. Not that I know of."

was directly refuted by employee Gibbon [R. 745]. In any event, the statement made no impression on Smith who joined the CIO shortly thereafter and was the first to wear a CIO button at the plant at that time [R. 596-597]. *Cf. Diamond T. Motor Car Co. v. National Labor Relations Board,* 119 F. (2d) 978, 982 (C. C. A. 7th, 1941); *Ballston-Stillwater Knitting Co. v. National Labor Relations Board,* 98 F. (2d) 758, 762 (C. C. A. 2nd, 1938). Furthermore, such an isolated instance of alleged employer interference is not sufficient to sustain a finding of a violation of the Act. *E. I. du Pont de Nemours & Co. v. National Labor Relations Board,* 116 F. (2d) 388, 400 (C. C. A. 4th, 1940), cert. den. 313 U. S. 571, 61 S. Ct. 959 (1941).

The only other coercive statements alleged to have been made by respondent's supervisory employees were those testified to by Porter and Kangas. Not only was the statement allegedly made, according to Kangas, by Hileman to the Allance Committee denied by Hileman [R. 1178], but Bebb, who was present at this meeting [R. 390], denied any such statement was made [R. 669-670]. For the reasons heretofore pointed out, the testimony of Porter and Kangas could not properly furnish a basis for any finding.

The hearing in this proceeding covered the activities at respondent's plant over a period of more than five years. Not a single act of discrimination against a CIO member was shown to have occurred during that entire period of time, though respondent did not hesitate to discipline members of the Alliance, as in the instances involving Baldwin and Bright, above referred to. The record establishes that the employees of respondent knew

that they were free to take, and they did, any action relative to unionism that they desired without fear of any reprisals from respondent. Under such circumstances, we submit, no violation of Section 8(1) of the Act occurred.

Conclusion.

It is submitted that under the National Labor Relations Board Appropriation Act, 1944 the Board's petition herein for enforcement of its order must be denied in its entirety. Furthermore, enforcement must be denied because of the unreasonable delay in the filing of the charge. Finally, there is no substantial evidence establishing that respondent dominated the Alliance in its formation or administration or otherwise interfered with the rights of its employees and the petition for enforcement must therefore be denied.

Dated: August 7, 1943.

Respectfully submitted,

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APPENDIX A.

National Labor Relations Act.

The pertinent provisions of the National Labor Relations Act [Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151-166 (Supp. II, 1936)] are as follows:

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively

safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Sec. 2. When used in this Act * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the

District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

* * * * * * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to Section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * * * * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * * * * * *

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate tem-

porary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

APPENDIX B.

Legislative History of the National Labor Relations Board Appropriation Act, 1944.

(All page references herein are to Volume 89 of the Congressional Record.)

H. R. 2935, "An Act making appropriations for the Department of Labor, the Federal Security Agency, and related independent agencies, for the fiscal year ending June 30, 1944, and for other purposes," was introduced in the House of Representatives on June 14, 1943. On the same date Mr. Hare, from the Committee on Appropriations, submitted a report (H. Rep. 540, 78th Cong., 1st Sess.) thereon, and the Bill was then submitted to the Committee of the Whole House (pp. 5918, 5927). The Bill was debated in the House on June 15 and June 16, 1943 (pp. 5998-6019, 6030-6053).

During the debate in the House on June 16, 1943, Representative Hare offered an amendment to the Bill adding to the provisions of Title IV thereof, appropriating funds for the National Labor Relations Board, the following:

> "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for 3 months or longer without complaint being filed." (p. 6047.)

In explaining his amendment, Mr. Hare stated as follows:

> ". . . It simply means that the National Labor Relations Board will not be charged with the responsibility, nor will it have the authority or right to take jurisdiction of a complaint unless the contract

> under which the complaint is made has not been in force for as much as 3 months. Where an agreement between management and its employees has been in operation for as long as 3 months or more and no complaint has been filed by management or no formal complaint filed by the employees, National Labor Relations Board would not have jurisdiction and would be relieved of any duty or expense until the availability of these funds expires."

After a very brief discussion in which reference was made to the disturbances caused by the National Labor Relations Board interference with existing collective bargaining contracts, as in the Kaiser shipyards, the amendment was agreed to (p. 6047). The Bill was passed by the House the same day (p. 6053).

On June 18, 1943, the Bill was read in the Senate and referred to the Committee on Appropriations (p. 6131). On June 24, 1943, Mr. McCarran from the Committee on Appropriations submitted a report (S. Rep. 342) on the Bill (p. 6485) in which the Committee recommended that the Hare Amendment in the House to Title IV be stricken. The debate on the Bill in the Senate began June 26, 1943 (p. 6644). When the proposed amendment to strike out the Hare Amendment was taken up for consideration, Mr. Bridges offered a substitute for the Committee Amendment which proposed the inclusion of the following:

> "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor, copy of which has been filed with the Labor Department for 3 months or longer without complaint being filed by a labor organization." (p. 6648.)

"This amendment," according to Mr. Bridges, was "aimed to stabilize labor differences during this critical wartime period." In the discussion that followed, the members of the Appropriation Committee and other members of the Senate indicated they approved the purpose of the Hare Amendment but they felt that some change in language might be necessary, and therefore the matter should go to conference. With this assurance, Mr. Bridges withdrew his proposed amendment (p. 6651) and the Committee Amendment striking the Hare Amendment from the Bill was then adopted (p. 6656).

The Bill was further debated in the Senate on June 28 (pp. 6718-6763) and June 29, 1943 (pp. 6821-6822). On the latter date the Bill passed the Senate and McCarran, McKellar, Russell, Bankhead, Truman, Lodge and White were appointed conferees. On June 30, 1943, the House appointed as conferees Hare, Tarver, Thomas (of Texas), Anderson (of New Mexico), Engel, Keefe, and H. Carl Anderson (p. 6924).

The same evening the conferees made their report (pp. 6960-6961), in which they reported disagreement on Senate Amendment No. 19 which was the amendment striking from the Bill the Hare Amendment adopted in the House. In the statement accompanying the report by the managers on the part of the House, the following comments were made relative to this Amendment (p. 6961):

> "Amendment No. 19: Strikes from the bill a provision, inserted by the House, prohibiting the use of the funds of the National Labor Relations Board in any case involving an agreement between management and labor which has been in force

more than 3 months. A motion will be made to recede from disagreement and concur in the amendment with an amendment as follows:

"Restore the matter proposed to be stricken out and add at the end thereof the following:

" '*Provided,* That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person.' "

On July 1, 1943, the conference report was discussed in the House (p. 7014). Relative to Senate Amendment 19, Hare moved to concur in the substitute amendment proposed by the conferees (p. 7022). During the discussion of this motion, the following comments were made:

". . . If you adopt the suggestion of the chairman of the subcommittee, the gentleman from South Carolina [Mr. Hare], you will in effect be saying that all existing contracts are frozen as they are, as far as an investigation by the National Labor Relations Board is concerned. As to whether they have been filed for 90 days heretofore or not does not matter. It is only hereafter that the 90-day provision applies, and you do say that all these contracts, whether phony or not, cannot be set aside by the National Labor Relations Board." (Anderson, p. 7025.)

"It was our information that the C.I.O. is preparing to raid, as the saying goes, quite a number of other industrial plants of the country if they are successful in their efforts to get the National Labor Relations Board to hold this election and install them as bargaining agents for the two Kaiser shipyards

on the west coast. We think that, regardless of the merits of the controversy, it would be extremely unfortunate to have such a controversy interfering with production at this particular time, and that the doctrine of the greatest good for the greatest number, that is, the matter of securing greatest efficiency in production for the war effort, should be the most important objective governing our actions. With that reason in view we should enact this proviso and stop this squabbling out there on the Pacific Coast or anywhere else in the country until this emergency is over, especially when the contract, whether it was proper at the time of its inception or not has been in effect for 3 months without complaint." (Tarver, p. 7026.)

"The attitude of the Senate conferees very clearly was that we as a Congress should endeavor to see if we could not stabilize conditions at least for the duration and allow these bargaining rights under existing contracts to remain as they are, provided they have been in existence for a period of 3 months without a complaint being filed. As to any future contract, if a complaint is filed within 90 days after its posting in the plant affected then as a matter of course the N.L.R.B. will have jurisdiction to order an election. It relates only to placing these existing contracts in status quo. If you vote for the committee amendment you are voting to freeze the contracts that have been in existence for a period of 3 months or more without a complaint being registered against them. That is all there is to it." (Keefe, p. 7027.)

Following this discussion, the Hare motion carried (p. 7027).

In the Senate on July 2, 1943, Senator McCarran moved that the Senate concur in the Amendment of the House to Senate Amendment 19 (p. 7103) and with reference thereto, stated as follows:

> ". . . We believe that when agreements are now in existence, regardless of whom the agreements may favor, the agreements should be frozen, if I may use that term, or at least stabilized for the duration of the war, and not disrupted by confusion, misunderstanding, elections, or what not."

After some discussion in which objection was voiced to the motion because the House provision would practically repeal the Wagner Act and would legalize company dominated unions, McCarran's motion carried (p. 7109).

Thereafter, on July 3, 1943, the Bill was referred again to conference because of disagreement on another Senate amendment, No. 24 (p. 7164). On July 8, 1943, the conferees reported (Rep. 698) that they were unable to agree and when the House adhered to its disagreement (p. 7579) the Senate receded from its Amendment No. 24 (p. 7545) and the Bill thus passed both houses of Congress. It was approved on July 12, 1943 as The Labor-Federal Security Appropriation Act, 1944 (Pub. 135, Chpt. 221, 78th Cong., 1st Sess.), Title IV thereof relating to the appropriations for the National Labor Relations Board being cited therein as the National Labor Relations Board Appropriation Act, 1944.

APPENDIX C.

Excerpts From Record, Pages 674-677.

(Testimony of Lester Sylvester Moses Bebb.)

Mr. Watkins: I think that is all.

The Witness: Mr. Examiner, I would like to make one statement.

Trial Examiner Whittemore: All right.

The Witness: In bringing this case up, I feel personally very deeply that we are in vital war defense work, defending the lives of our men out on the battlefield and I really feel that whoever made these charges, either management or the union, are the largest saboteurs we have in the United States. They are drawing men away from their work, vital defense work.

Trial Examiner Whittemore: What do you mean by that?

The Witness: That all these men who are here are wasting [542] their time while away from their vital defense work. They are losing man hours in putting out our defense equipment that the men need so badly.

Trial Examiner Whittemore: Where did you get that idea?

The Witness: There is only one important thing in this world now and that is to save our country, our homes, our families and the men who are out in the field and I feel things that are of so little importance like this when life and death mean a lot more than anything else.

Trial Examiner Whittemore: Is that your own personal feeling?

The Witness: It is.

Trial Examiner Whittemore: Did anybody suggest you make this statement when you got up here?

The Witness: No, sir.

Trial Examiner Wittemore: Why do you tell me that?

The Witness: I want it to go into the record, the way I feel about the whole thing or anything else.

Trial Examiner Whittemore: Why do you want it to go into the record? Did you say anything to counsel for the Board when he asked you to come and testify?

The Witness: No, sir, I did not.

Trial Examiner Whittemore: You waited before you got up here before you made the statement on the record?

The Witness: Yes, sir. [543.]

Trial Examiner Whittemore: That is all.

Mr. Watkins: Let me say one thing, Mr. Examiner. When I talked to Mr. Bebb, Mr. Bebb told me just the same thing he has told the Examiner.

Trial Examiner Whittemore: And you suggested he put it on the record?

Mr. Watkins: Just a minute and I will make my statement precisely as it happened.

He told me substantially what he said here and wanted to state it in the hearing. I told him that nobody could ask any questions on that but if he wanted to make a statement to go ahead if he wished to do so and if the Examiner stopped him, why, that would be all there was to it. That is what took place.

Mr. Baldwin: May I asked the witness one question?

Mr. Watkins: And I might say I agree with him one hundred per cent.

Trial Examiner Whittemore: Well, I think the answers show something to that effect.

Q. (By Mr. Baldwin) Mr. Bebb, when did you resign as secretary of the Alliance? A. In April of 1942.

Q. Why did you resign? A. I have been studying welding—making welding my life work in order to keep up with the new work in the welding [544] field, and I decided I wanted to study a little harder and learn the newer parts of welding.

Q. Did you make a statement at that time to any one, that one of your main reasons for resigning was because you were interested in doing war work and it was taking up too much of your time? A. I did.

Q. Did you say at that time that the union wasn't as important as the war going on? A. I did.

Mr. Moore: I will object to this line of questioning. I will stipulate that he resigned because he wanted to.

Trial Examiner Whittemore: Why all this?

Mr. Baldwin: I merely want to point out that I know this man and I know that he is telling the truth. I want to point out that he made these statements prior to any time he was ever here. [545.]

No. 10383

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THOMPSON PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THOMPSON PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I

The National Labor Relations Board Appropriation Act of 1944 does not require dismissal of the Board's petition for enforcement

Respondent's contention in Point I of its brief (pp. 4–10) that this proceeding should be dismissed because of the terms of the National Labor Relations Board Appropriation Act of 1944 is governed by the recent decision of this Court in *N. L. R. B.* v. *Cowell Portland Cement Co.,* Case No. 10374. The employer there involved moved this Court to dismiss the Board's petition for enforcement, alleging that the

Appropriation Act required such dismissal. The motion was argued on September 7, 1943, before Circuit Judges Garrecht, Denman, and Healy. It was denied from the bench. The Board is advised by its counsel that the grounds of the Court's action, as indicated by statements of the members of the Court at the oral argument, are applicable here. Accordingly, we are not briefing this point. However, if the Court desires to consider this question further, we request that we be given permission to file an additional memorandum on the subject.

II

The Board's findings and order are in all respects valid and proper

Conceding, in effect, the validity of the Board's ultimate finding of company domination on the subsidiary findings made, respondent has attacked that finding solely on the basis of a claim that the Board improperly credited the testimony of two witnesses. It is thus asking this Court to reevaluate the evidence, redetermine the credibility of witnesses, and to resolve, independently of the Board's findings of fact, the conflicts in the evidence. The issues thus raised are clearly not within the scope of the review provided by Section 10 of the Act. *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 597; *N. L. R. B.* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208–209, 226; *Washington, Virginia & Maryland Coach Co.* v. *N. L. R. B.*, 301 U. S. 142, 146–147; *N. L. R. B.* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106–107; *N. L.*

R. B. v. *Oregon Worsted* Co., 96 F. (2d) 193, 195 (C. C. A. 9); *N. L. R. B.* v. *Pacific Gas & Electric Co.,* 118 F. (2d) 780, 788 (C. C. A. 9); *N. L. R. B.* v. *Tovrea Packing Co.,* 111 F. (2d) 626, 630 (C. C. A. 9), cert. denied, 311 U. S. 668; *N. L. R. B.* v. *Security Warehouse and Cold Storage Co.,* decided August 17, 1943 (C. C. A. 9).

While giving lip service to these cases, respondent argues that the Board's findings are not adequately supported because of the alleged "utter worthlessness" of the testimony of Kangas and Porter (Brief, p. 25). We submit that this contention is entirely without merit.

In the first place, the Board's ultimate finding did not rest on the testimony of Kangas and Porter alone. Many of its subsidiary findings concerning the origin of the Alliance and respondent's assistance thereto are based on documentary evidence and the testimony of other witnesses.[1] Moreover, the activity of super-

[1] E. g., in connection with respondent's expressed preference for an "inside union," the Board based its findings on the testimony of Livingstone and Drake (R. 58–59, note 8; 1235–1236; 1274–1275; 1294–1296). As to Porter's activities in initiating the formation of the Alliance, the record shows, independently of the testimony of Kangas or Porter, that Porter referred the Alliance's constitutional committee to the attorney who drew up its constitution and bylaws (R. 63, note 16: 1298); that Porter acted as spokesman for the group of employees which he led into respondent's office at Livingstone's behest, to initiate the organization of the Alliance (R. 652). In regard to respondent's interference and coercion, and domination of the Alliance, there is also much other evidence upon which the Board based findings: e. g., the testimony of Crank (R. 507–513), Smith (R. 530–536; 565–568), Spencer (R. 606–607), Baldwin (R. 1145), Overlander (R. 631–634), the "Friendly Forum" (R. 1262; 1271), and other evidence summarized at pp. 10–17 of the Board's main brief.

visory employees on behalf of the Alliance is established by unchallenged proof (Board's main brief, pp. 12–13).

In the second place, the testimony of Kangas and Porter was clearly entitled to acceptance. The two witnesses were in accord on all essential facts; even respondent is forced to admit that "they told the same story in general" (Brief, p. 15). Many of the "conflicts" and "inconsistencies" which respondent purports to find are illusory, as examination of the record will reveal.[2] A few of the bases for respondent's attack on these two witnesses may be dealt with here.

Respondent seeks to show that Porter's testimony is entitled to no credence because "he joined the union in April 1942 [R. 274], reported to the Board in the same month as to his alleged activities in organizing the Alliance in 1937 [R. 289], and the union filed its charge with the Board on May 1, 1942" (Brief, p. 13). The picture thus sought to be painted is that of a zealous C. I. O. member who rushed to the Board with a complaint immediately upon join-

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[2] For example, respondent is in error in stating that Porter testified that Kangas did not tell him why Livingstone wanted to see him at the Jonathan Club (Brief, pp. 14–15). Porter was in no way connected with the War Production Board incident (Brief, p. 14). With respect to who initiated Porter's espionage activities (Brief, p. 15), Porter testified first that he did not remember which of respondent's officials spoke to him about this matter (R. 260) and later that he did not *remember* Kangas mentioning the matter (R. 331), not that Kangas did not do so. Kangas' testimony that he broached the matter (R. 373–374) is therefore consistent with Porter's testimony, particularly in view of Porter's statement that he reported to Kangas (R. 264).

ing the Union. In fact, Porter originally joined the Union in 1937, not out of sympathy for the organization, but at respondent's behest, in order to spy upon it (R. 259–266; 373–376; 420–422). His reaffiliation in 1942 was part of a general movement in respondent's plant, when a number of members of the company-dominated Alliance, having become disillusioned with it, shifted their allegiance to the Union (R. 521–523; 576–579; 616; 618–620; 626; 638; 645. See also R. 274). Finally, Porter was *summoned* to appear before the Board by telegram, to tell what he knew about the illegal origin of the Alliance. He had not, prior to that time, had any communication with the Board (R. 289–290).

Another alleged defect in Porter's testimony relates to the naming of the Alliance (Brief, p. 14). His statement that he was with Kangas when Livingstone dictated to the latter a text for the Alliance membership application card (R. 226–227, 331), is supposed to be inconsistent with his statement that when he later visited Livingstone at the Jonathan Club, the latter asked him what name to give the organization (R. 247–248).[3] Any one of a number of reasons might have prompted Livingstone to ask Porter what the name of the organization should be: to rehearse him in the name of the organization, to discover possible reasons why the proposed name should be changed, or even to let Porter feel that he was being consulted about the matter. At any rate,

[3] When Porter said he did not know, Livingstone suggested the name he had already dictated to Kangas (R. 247–248).

there is nothing inconsistent or incredible about Porter's testimony in this connection.

Respondent produced no evidence to refute Porter's testimony that he joined the Union in 1937, at its behest, and reported on at least one meeting to Kangas, and that he was furnished with money for the payment of his dues by Hodges. As a sort of afterthought, respondent now attempts in its brief (p. 16) to cast doubt on the occurrence of this espionage, by referring to the testimony of Runyan (R. 779–780) that Porter's card "was not among those noted" when he made a check of the union cards in 1937. Aside from the fact that Runyan was "just guessing" as to whether he made a check before or after Porter joined the Union, he might well have failed to remember "noting" Porter's card.

One important issue in this case is whether Porter played a prominent role in the steps leading to formation of the Alliance (Board's main brief, pp. 7–9). On this issue, respondent offered the testimony of what it refers to as "a number of reliable witnesses" (Brief, p. 16). This testimony proved entirely worthless. Even Bebb, whose hostility to the Board was no secret (R. 624–625), corroborated Porter's testimony that it was he who, as spokesman for the group of employees who met with Livingstone on July 27 (Board's main brief, pp. 8–9), announced their desire to organize an "independent" union (R. 652). Again, despite the attempt of respondent's witnesses to give the impression that Porter was not present at the early organizational meetings of the Alliance (R. 667–668, 786, 1134), Bebb, upon being shown

Porter's signature on the first draft of the Alliance's constitution (R. 107, line 25), reversed his earlier testimony and admitted that Porter must have been present at the meeting at which the constitution was adopted (R. 679–680).

The record furnishes further independent corroboration of Porter's role as the initiator, on respondent's behalf, of the formation of the Alliance. Respondent concedes that Porter picked up the Alliance's cards from the printer (Brief, p. 17). It is not disputed that Porter referred the Alliance constitutional committee to the attorney who drew up the Alliance constitution (R. 1298). In view of the fact that none of the other early leaders of the Alliance had any clear recollection of the early steps in its origin (see, e. g., R. 677), Porter's testimony that he was the moving figure in its establishment becomes conclusive.

The case of *N. L. R. B.* v. *Sun Shipbuilding and Drydock Co.,* 135 F. (2d) 15 (C. C. A. 3), on which respondent relies (pp. 26–29), presented an entirely different situation. A consideration repeatedly stressed by the Court in arriving at its decision in that case was the "absence of employer hostility to bona fide collective bargaining" (135 F. (2d), at p. 26). It attached great importance to the fact that "at all times up to the formation of the Association, the respondent * * * had uniformly accorded to its employees the unrestricted right to bargain collectively either through affiliated or unaffiliated organizations of their own choosing" (135 F. (2d), at p. 21). Precisely the opposite situation is present here, as

shown by unquestioned evidence. Livingstone's outright expression to the plant supervisors of preference for an inside union is admitted (Board's main brief, p. 6), and whether or not, as petitioner claims (Brief, pp. 37–38), the anti-union diatribes in the "Friendly Forum" (Board's main brief, pp. 16–17) were privileged, they are nevertheless "illuminative as evidence of motive, intent, and attitude toward labor union activities of the employees." *N. L. R. B.* v. *Chicago Apparatus Co.,* 116 F. (2d) 753, 757 (C. C. A. 7). Hence, there was solid basis for the Board's resolution of the conflicting testimony of Porter and Kangas and respondent's officials. "Motive is a persuasive interpreter of equivocal conduct, and [respondent is] not entitled to complain because [its] activities were viewed in the light of manifest interest and purpose." *Texas and New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, 559.[4]

[4] The *Sun* case is also distinguishable on two other grounds. The Court there repeatedly stressed the fact that the allegedly company-dominated union had been chosen by the employees in a secret ballot (135 F. (2d), at pp. 18, 19, 22–23). No election was ever held in the instant case. Again the court noted in the *Sun* case, in considering the activities of certain "leaders" on behalf of the Association, that their activities could not be ascribed to the employer since the "leaders" are "sufficiently detached from management so as to be eligible to organize with other employees for collective bargaining purposes, and both the Association and the complaining union admitted and still do admit, such employees to membership" (135 F. (2d), at p. 20). The case at bar differs basically since the supervisory employees active in the formation and affairs of the Alliance were admittedly not eligible for membership even in the Alliance, which subsequently asked them to resign.

In sum, the Board gave careful consideration to respondent's attack on the general credibility of Kangas and Porter. For the reasons set forth by the Trial Examiner (R. 56–58, note 7) and adopted by the Board (R. 46–47), respondent's contention that their testimony was worthless was rejected. The multitude of petty details, misrepresentations of the record, and baseless insinuations contained in respondent's brief cannot on any theory be treated as proof of arbitrary action on the part of the Board. In view of the basic consistency and credibility of the testimony of Kangas and Porter, of the independent proof of hostility to unions on the part of respondent and active support of the Alliance, the Board's findings rest on a substantial foundation in the evidence, and are not, therefore, subject to review.

A few additional points made by respondent may be disposed of briefly. Respondent asserts, as proof that there was no company interference in the formation of the Alliance, that the employees "discussed" formation of an inside union before Porter, at respondent's direction, intervened in the situation (Brief, pp. 29–31). However, the very portions of the record cited by respondent in this connection show that prior to Livingstone's visit to the plant the employees had discussed, and even tentatively joined, the A. F. of L. (R. 662–663), had weighed the merits of the A. F. of L. as against a "company union sponsored * * * by Lyman Hodges * * *,"[5] had debated the merits of inside and outside unions, both A. F. of L. and C. I. O. (R. 775–776), and had arrived

[5] Hodges was then head inspector of the plant (R. 232).

at no decision. At this critical point, in order to forestall organization by the C. I. O., which, as Livingstone testified, he had been told had many adherents among the employees (R. 1230), respondent took steps to make the employees' choice for them by herding them into an inside union. In such circumstances, to talk of the Alliance as having been "formed by the employees and without any suggestion or encouragement from respondent" (Brief, p. 31) is sheer nonsense.

Livingstone's clearly expressed preference for an inside union, communicated to the meeting of supervisors (Board's main brief, pp. 5–6) is of the greatest significance, despite respondent's cavalier attempt to brush it aside as of no importance (Brief, pp. 11–12). "The employer's attitude toward unions is relevant." *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 600. Moreover, Livingstone's expression of respondent's preference as well as its threat to close down the plant if the C. I. O. came in was thereafter carried to the employees by the supervisors (R. 293–294; 390–391; 514–518; 577; 628–629; 630), who were merely "emulating the example set by the management." *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 81.

Respondent's contention (Brief, p. 11) that the Board should not have entertained the charges herein, because of the complaining union's delay in filing them, is notable in that it ignores the fact that the illegal conduct of respondent, secret in its very nature, did not come to light for a long time after most of it

was committed (R. 289–290). Moreover, it is well established that a proceeding on behalf of the Government may not be barred by the doctrine of laches. *Chesapeake and Delaware Canal Co.* v. *U. S.,* 250 U. S. 123, 125; *Board of Commissioners* v. *U. S.,* 308 U. S. 343; *In re Cuban Atlantic Transportation Corp.,* 57 F. (2d) 963 (C. C. A. 2); *N. L. R. B.* v. *Nebel Knitting Co.,* 103 F. (2d) 594 (C. C. A. 4); *Phelps Dodge Corp.* v. *N. L. R. B.,* 113 F. (2d) 202 (C. C. A. 2), affirmed 313 U. S. 177; *U. S.* v. *Nashville,* 118 U. S. 120, 125; *U. S.* v. *Beebe,* 127 U. S. 338, 344; *U. S.* v. *Insley,* 130 U. S. 263, 266. "There is no bar through lapse of time to a proceeding in the public interest to set an industry in order . . ." *F. T. C.* v. *Algoma Lumber Co.,* 291 U. S. 67, 80. The instant proceeding, like all proceedings under the Act, is in the public interest for a public end, not in the interest of the particular claimants. *Amalgamated Utility Workers* v. *Consolidated Edison, Inc.,* 309 U. S. 261, 269; *Agwilines, Inc.* v. *N. L. R. B.,* 87 F. (2d) 146, 150, 151 (C. C. A. 5); *N. L. R. B.* v. *Colten, et al.,* 105 F. (2d) 179, 182–183 (C. C. A. 6). As was stated in *N. L. R. B.* v. *Sun Shipbuilding and Drydock Co.,* 135 F. (2d) 15, 23 (C. C. A. 3), "We are unaware of any rule of law which would justify a court in saying that, because charges are belated, the Board abuses its discretion when it refuses to dismiss a complaint for that reason."

Respondent's reckless charge that Trial Examiner Whittemore conducted the hearing herein in a biased and prejudiced manner is entirely baseless (Brief,

pp. 21–23). The two "illustrative incidents," culled from a record of more than 1,200 printed pages, which are offered in support of this charge fail to show any improper conduct on the Trial Examiner's part. We assert confidently that an examination of the entire record will reveal that the Trial Examiner conducted the hearing with the utmost of fairness and decorum. That fairness and decorum is illustrated rather than refuted by the Bebb incident set forth in respondent's brief (App. C, pp. 52–54). It shows that respondent's counsel, advised beforehand that the witness, Bebb, intended to make a highly inflammatory statement at the hearing, told him "if he wanted to make a statement to go ahead." In allowing this provocative occurrence to pass without further comment the Trial Examiner evidenced extreme judicial calm and restraint.

Respectfully submitted.

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTARY MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10383

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THOMPSON PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTARY MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD

This Memorandum is submitted in accordance with the instructions of this Court at the oral argument in the above case held on November 1, 1943. We discuss two points herein: (1) Whether the Board's appropriation act for the current fiscal year requires dismissal of the petition for enforcement; and (2) whether certain of the acts of interference, restraint, and coercion engaged in by respondent were constitutionally privileged as an exercise of the right of free speech.

I.

The National Labor Relations Board Appropriation Act of 1944 does not require dismissal of the Board's petition for enforcement

In its brief (pp. 4–10) and in argument before this Court, respondent contended that the Board's petition

for enforcement must be dismissed because a proviso attached to the Board's appropriation for the fiscal year ending June 30, 1944, allegedly precludes the Board's use of any of its funds in this proceeding. The proviso reads as follows:

> No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed * * * (Labor-Federal Security Appropriation Act, 1944, Act of July 12, 1943, Public Law No. 135, 78th Congress, 1st Session).

At the outset it should be noted that under no circumstances could respondent be entitled to a *dismissal* of this *proceeding* because of the proviso. The most that it may ask is an order forbidding the Board from using its funds to finance the proceeding. Nothing in the proviso prevents a determination of the instant case with the Department of Justice, for example, representing the Board. The narrow issue is, therefore, whether this Court should deny the Board's right to represent itself herein, and thereby overrule a decision of the Comptroller General which, as we show below, establishes that right.

The Board submits that no such result should be reached by this Court because:

A. The proviso does not amend the National Labor Relations Act.

B. The proviso does not preclude the Board's use of its funds in the instant proceeding. As the Comptrol-

ler General of the United States has ruled, the term "complaint case" as used in the proviso does not refer to enforcement proceedings in the courts.

C. The Board's use of its funds is not subject to judicial review.

D. Respondent may not challenge the Board's use of its funds in connection with the instant proceeding.

Since passage of the Appropriation Act, several efforts similar to that of respondent here have been made to preclude the Board from seeking enforcement of its orders. All of the decisions so far announced by the Courts have been favorable to the Board. *N. L. R. B.* v. *Cowell Portland Cement Co.,* Case No. 10374 (C. C. A. 9), motion denied from the bench, September 7, 1943; *N. L. R. B.* v. *Baltimore Transit Co.,* Case No. 5103 (C. C. A. 4), motion denied, October 5, 1943, see 13 L. R. R. 165–166; *N. L. R. B.* v. *Elvine Knitting Mills, Inc.*, Case No. 14 (C. C. A. 2), motion denied in *per curiam* opinion, October 26, 1943, 13 L. R. R. 281. The last-named case is the only one in which the Court deemed it desirable to set forth the grounds of its action, stating:

> In a supplemental brief respondent asserted that the Board's petition was barred by reason of a statute passed after the petition was filed in this court. Labor-Federal Security Appropriation Act, 1944, Act of July 12, 1943, c. 221, Public No. 135, Tit. IV, 78th Cong., 1st Sess., providing: "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor

which has been in existence for three months or longer without complaint being filed." The Board quotes a ruling which it has received from the Comptroller General that this restriction does not apply to a case such as this already in the appellate court, and it further asserts that the present is properly not a case involving a labor agreement of the kind described in the statute. More broadly still it asserts that such a claim is not within our powers of review, under § 10 (e) of the Act, or one that respondent may raise, under *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 478–480, 58 S. Ct. 300, 82 L. Ed. 374, and other cases—contentions which we understand respondent substantially conceded at the argument and with which we agree.

A

The proviso does not amend the National Labor Relations Act

In determining whether or not the proviso to the Appropriation Act amends the National Labor Relations Act, the decisive factor is the intent of Congress. *U. S.* v. *Mitchell,* 109 U. S. 146, 150. That is the rule which was applied in *U. S.* v. *Dickerson,* 310 U. S. 554, on which respondent relies to show that the Act has been amended. Thus, after holding that Congress can amend or repeal substantive legislation "by an amendment to an appropriation bill, or otherwise" (*id.,* at 555), the Court went on to note that "the question remains whether it did so" (*id.,* at 556).

The *Dickerson* case is not controlling here since the history of the legislation there involved left little

room for doubt as to the Congressional intent. A 1922 statute had provided for the payment of certain re-enlistment bonuses. Appropriation acts for the fiscal years ending in 1934, 1935, 1936, and 1937 had banned payments under this provision in language which concededly disclosed Congress' intent to *suspend* the operation of the 1922 Act for those fiscal years.[1] The appropriation acts for the 1938 and 1939 fiscal years also banned payments under the 1922 Act, but they used different language to accomplish this purpose, language which did not on its face show an intent to suspend or modify the 1922 Act.[2] The Supreme Court examined the legislative history of the 1938 and 1939 appropriation acts (310 U. S., at pp. 556–561)[3] and concluded that "Congress intended the legislation * * * [for] 1938 and 1939 as *a continuation of the suspension* enacted in each of the four preceding years" (*id.*, at p. 561) [italics supplied].

[1] The provision of the 1934 Act read as follows: "So much of Sections 9 and 10 of the Act * * * *is hereby suspended* as to re-enlistments made during the fiscal year ending June 30, 1934." [Italics supplied.]

[2] The 1938 Act read as follows: "No part of any appropriation contained in this or any other Act for the fiscal year ending June 20, 1938, shall be available for the payment of re-enlistment allowances * * * notwithstanding the applicable provisions of Sections 9 and 10 of the Act" of 1922.

[3] Thus it noted that the amendment was viewed by Congress as a "further suspension" of the bonus (310 U. S., at p. 558) and that, when the 1938 appropriations were being considered in the House of Representatives, repeated points of order that the proposed rider constituted substantive legislation were conceded to be valid by proponents of the rider and were sustained (*id.*, at p. 559).

An intent on the part of Congress to amend earlier legislation may also be revealed by the express langauge of subsequent appropriation acts. Thus, in *U. S.* v. *Perry,* 50 Fed. 743 (C. C. A. 8), and *U. S.* v. *Aldrich,* 58 Fed. 688, 689 (C. C. A. 1), an earlier appropriation act barring the use of the money appropriated in that Act for the payment of certain per diem allowances had been succeeded by an appropriation act which provided that "*hereafter* no part of the appropriations made * * * shall be used * * * [for certain purposes] * * * nor shall any part of *any* money appropriated be used * * * [for the per diem allowances in question]" [italics supplied]. It was held in both cases that the later appropriation act was a substantive amendment, but in the *Aldrich* case, it was further held that the earlier act was "not a prohibition of a per diem, but extend[ed] merely to that appropriation; so that the legal right to the per diem remained the same as though the Act had not been passed * * *." See also *Swift* v. *U. S.,* 128 Fed. 763 767–768 (C. C., D. Mass.), affirmed on other grounds 139 Fed. 225 (C. C. A. 1).

It is not without significance that in all of the cases which we have found, in which it has been held that a statute has been amended by an appropriation act rider, the statute affected was pecuniary in nature and therefore pecularily subject to repeal or amendment by the withholding of funds. We have found no case in which remedial social legislation creating substan-

tial rights has been deemed to be repealed by the withholding of funds for a single year.

We submit that in view of the presumption against repeal by implication,[4] it should not be held that the Act has been set aside in part in the absence of a clear showing of legislative intent. As we shall now demonstrate, no such showing can be made here.

It is manifest that the rider is not substantive legislation but merely constitutes a temporary limitation upon use of the Board's current appropriation.[5]

It is generally acknowledged, as respondent concedes (Resp. Brief, pp. 5, 7, 10), that the real purpose of the proviso was to prevent the Board from procceeding to a decision and order in the *Kaiser* cases, then pending before it (App. A, pp. 3–6).[6] The legislative history of the proviso plainly indicates that in achieving that result, the proponents of the limitation did not intend to affect the Board's statutory authority, nor to make any substantive alteration in the Act. Thus Congressman Hare, who originally introduced the rider in the House (89 *Cong. Record,* 78th Cong., 1st Sess., pp. 6046–6047), stated flatly, "there is no attempt to amend the National Labor Relations Act" (*id.,* p.

[4] *U. S.* v. *Borden Co.*, 308 U. S. 188, 198–199; *U. S.* v. *Jackson*, 302 U. S. 628, 631.

[5] See IV *Hinds' Precedents of the House of Representatives* (1907), §§ 3917–3926; 3929; VII *Cannon's Precedents of the House of Representatives* (1935), §§ 1580, 1585–1594, 1638–1639, 1710.

[6] See also 89 *Cong. Record*, 78th Cong., 1st Sess., pp. 6047 (Cong. Ditter), 7025 (Cong. Norton and Anderson), 7026 (Cong. Tarver), 7104 (Sen. Reed), 7106 (Sen. Shipstead), 7108 (Sen. McCarran).

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7024). Senator McCarran, in charge of the bill in the Senate (*id.* pp. 6647, 6650), expressed a like intent on the part of that chamber.[7]

The remarks, on which respondent relies, of those "who opposed the measure" (Brief, p. 6), were at most expressions of a fear that the rider might be construed more broadly than was intended by its proponents. These fears must be treated as having been allayed by the reassurances given by the proponents. Certainly, we must look to the authors of a legislative act rather than to its opponents for an authoritative interpretation of its intent.[8] Moreover, to the extent

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[7] "* * * We do not in an appropriation bill propose to amend or alter or nullify a legislative act which has been passed by Congress and which has received Executive approval."

"* * * All members of the committee are in favor of stabilizing labor conditions, and if we could do so without destroying the Wagner Labor Relations Act, we would. At the same time, we do not want to destroy an act which has been passed by Congress after long debate and consideration."

"* * * We want to provide limitations which will be wholesome for the welfare of the country in this unhappy hour, but we do not want to vitiate the Act" (89 *Cong. Record*, 78th Cong., 1st Sess., p. 6650).

[8] Thus the Supreme Court has attached particular weight to the remarks of those legislators who, like Senator McCarran and Congressman Hare here (89 *Cong. Record*, 78th Cong., 1st Sess., pp. 6046–6047, 6647, 6650), are "in charge of a bill in course of passage." *Duplex Co.* v. *Deering*, 254 U. S. 443, 475; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493–494; *Wright* v. *Vinton Branch*, 300 U. S. 440, 463–464. See also *McClure* v. *U. S.*, 95 F. (2d) 744, 751 (C. C. A. 9), affirmed 305 U. S. 472. Thus in the *McCaughn case* the Court said:

"Nor do we think of significance the fact relied upon here and by the Court below that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by senators who were not in

that there was a conflict of views, Congress' adoption of the proviso must be treated as an acceptance of the interpretation and intent of the proponents.

The legislators' intent not to amend the Act is further shown by the fact that the rider was meant to have only a temporary effect.[9] In fact, it is apparent that if no rider is attached to the Board's appropriation for the next fiscal year, the National Labor Relations Act will remain in full force and effect. Hence, it cannot be contended that a substantive amendment has been added to the Act.

B

The proviso does not preclude the Board's use of its funds in the instant proceeding

The proviso clearly does not preclude the Board's use of its funds in the instant proceeding. The proviso states that the Board shall not use any of its

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charge of the bill. For reasons which need not be restated, such individual expressions are without weight in the interpretation of a statute."

[9] "Mr. McCarran. * * * I made the statement that this provision would tend to stabilize labor relations for the duration of the war. In that statement I was in error, because this bill is an appropriation bill, which runs for only 1 year. But in the interim the Congress hopes that legislation may be enacted which will stabilize labor relations for the duration of the war" (89 *Cong. Record*, 78th Cong., 1st Sess., p. 7103).

"Mr. Hare. * * * In other words, where contracts have been in operation for 3 months or longer and no complaint has been filed with the National Labor Relations Board, the National Labor Relations Board would be relieved of the necessity of going in and taking jurisdiction any time within the next 9 months, or during the life of this appropriation. The committee feels that possibly in that time the necessity for interference may not be necessary" (*id.*, p. 6046).

funds in connection with a "complaint case * * *." At the request of the Board, and pursuant to statutory authorization (*Budget and Accounting Act,* 1921, Sec. 304; 42 Stat. 20, 24; 31 U. S. C., Sec. 74), the Comptroller General of the United States, on July 29, 1943, issued his ruling, a copy of which is attached hereto (App. A), interpreting this phrase. The Comptroller General ruled that the phrase "complaint case" as used in the proviso refers to cases in the "complaint stage" before the Board, and not to enforcement proceedings before the circuit courts of appeals, such as is the instant proceeding. Accordingly, the Comptroller General held that (App. A, pp. 14, 3–9)—

> * * * The Board is not precluded from expending from its appropriation such amounts as may be necessary in connection with further proceedings in those cases as to which a decision and order were issued by the Board prior to July 1, 1943.[10]

The Board's decision in the instant case was issued on December 31, 1942 (R. 49).

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[10] This is also the view of the Board as to the proper construction of the proviso. The persuasive considerations, based upon the legislative history of the proviso, the terminology used in Section 10 of the National Labor Relations Act, and other factors, upon which this view rests, are fully set forth in the Comptroller General's opinion, to which we respectfully refer the Court in this regard (App. A, pp. 3–9, 14).

In a later opinion issued on October 21, 1943, the Comptroller General ruled that the current appropriation of the Board is not available for use in connection with cases involving allegedly company-dominated unions which have had contractual relations with the employer for at least 3 months without charges being filed. The later ruling, however, applies only to cases in the "complaint stage," that is, to cases not affected by the earlier ruling of

The Comptroller General's interpretation of the proviso is binding upon the Board. It is well settled that decisions of the Comptroller General upon questions involving disbursements to be made by or under the head of an executive department or independent establishment are "conclusive upon the executive branch of the Government" (*Skinner & Eddy Corp.* v. *McCarl,* 275 U. S. 1, 4–5 note). "Disbursing officers, or the head of any executive department * * *, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement." (*Budget and Accounting Act,* 1921, Sec. 304). See also *Brunswick* v. *Elliott,* 103 F. (2d) 746, 750 (App. D. C.); 33 Ops. Att'y Gen. 268; 33 Ops. Att'y Gen. 265.[11]

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the Comptroller General. Since that earlier ruling, without more, holds the rider inapplicable to the instant case, the second ruling has no effect here except to preclude the Board from contending before this Court that the rider was not intended to apply to cases arising under Section 8 (2) of the Act.

[11] Moneys appropriated to a governmental agency by the Congress are not paid directly to the agency but are held in the U. S. Treasury to the credit of the agency. The Treasury pays over sums to the agency or its creditor only upon receipt of a voucher approved by the General Accounting Office. *Budget and Accounting Act*, 1921, Secs. 304, 305. Since the Comptroller General's ruling governs the General Accounting Office, it is clear that the ruling likewise governs the agency's power to draw upon the funds credited to it in the Treasury. See, also, Mansfield, *The Comptroller General* (1939), p. 2. Rulings of the Comptroller General have been accepted by the Supreme Court as persuasive authority. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 126, note 14.

C

The Board's use of its funds is not subject to judicial review

We have demonstrated under Point B hereof that the proviso to the Board's appropriation for the current fiscal year does not preclude the Board's use of its funds in the instant case. But even if the proviso could be regarded as applicable, we submit that it cannot constitute a defense to this proceeding because the Board's use of its funds is not subject to judicial review.

This Court was, of course, created by Congress,[12] and its "organization," its "authority," its "limited jurisdiction," and its "powers" all are received "from the legislature only."[13] Thus, any authority of this Court to review expenditures by administrative agencies must depend upon some act of Congress. However, the Congress has nowhere authorized judicial review of administrative or executive expenditures. To the contrary, Congress has clearly manifested its intention that the use of appropriations be not subject to judicial supervision. The creation of the General Accounting Office as a check upon governmental expenditures[14] has at once provided a specialized

[12] Act of March 3, 1891, 26 Stat. 826; Act of March 3, 1911, 36 Stat. 1131 *et seq.*, 28 U. S. C. §§ 211 *et seq.* (Judicial Code, sections 116 *et seq.*). See Hughes, *Federal Practice Jurisdiction & Procedure* (1931), §§ 105 *et seq.*

[13] *Chisholm* v. *Georgia*, 2 Dall. 419, 432 (U. S. 1793); *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721 (U. S. 1838); *Kempe* v. *Kennedy*, 5 Cranch 173, 185 (U. S. 1809); *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 283; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 329–331 (U. S. 1816).

[14] See discussion under Point B, *supra*.

agency to handle this complex technical matter and obviated any possibility of the courts' being burdened with the minutiae of detail indigenous to accounting. Congress' intention that the use of appropriations be subject to legislative rather than judicial control is further emphasized by the fact that Congress has reserved to itself the final review of executive and administrative expenditures. Thus, the Comptroller General is required to report to Congress every expenditure or contract made by any department or establishment in any year in violation of law (*Budget and Accounting Act,* 1921, Sec. 312 (c)). As the congressional scheme contemplates, the proper use of appropriations has remained exclusively a matter between Congress, the Comptroller General, and the agency involved. Consequently, the propriety of expenditures made pursuant to valid appropriations has not been made the subject of judicial cognizance.

Nor does this Court's jurisdiction over the case at bar, under the National Labor Relations Act, authorize review of the Board's use of its funds. The instant proceeding is, of course, a purely statutory one, under Section 10 (e) of the Act, to enforce the Board's order. It is well settled that this Court derives its "jurisdiction to act" therein solely from the Act (*N. L. R. B.* v. *Waterman S. S. Corp.,* 309 U. S. 206, 209), and has power to review the Board's order only "in the respects indicated by the Act" (*Matter of National Labor Relations Board,* 304 U. S. 486, 492–494). "Congress has placed the power to administer the National Labor Relations Act in the Labor Board, subject to the supervisory powers of the [Circuit]

Courts of Appeals *as the Act sets out.*" [Italics added.] (*National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 342.) [15]

It seems too clear for argument that this Court is not, and may not be, concerned in enforcement proceedings under the Act, with questions as to the propriety of the Board's expenditure of funds appropriated to its use by the Congress. As the Supreme Court has stated (*N. L. R. B.* v. *Bradford Dyeing Association,* 310 U. S. 318, 342)—

> If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a "hearing," which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the [Circuit] Court of Appeals requires the Court to grant enforcement of the Board's order.

It is clear that under the statutory scheme, the Court is concerned with the matters of substance to which reference is made in the Supreme Court's opinion quoted above, and not with such wholly unrelated and collateral matters as the availability of Board funds. As well might the Court be requested to refuse enforcement of a proper Board order because the attorney who appeared for the Board in this Court had allegedly been improperly classified at the time

[15] See also, *American Federation of Labor* v. *N. L. R. B.*, 308 U. S. 401, 407–409; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 597.

of his employment and hence compensated at an improper rate under existing civil-service law. Yet no one would suggest that an employer might, in enforcement or review proceedings under the Act, divert the energies of the Court and the Board to such matters.

As we have noted (Point A, *supra*), these principles and the established procedure for review of Board expenditures were not changed by the proviso to the Board's appropriation for the current fiscal year. The proviso merely prescribes certain limitations upon the Board's use of its funds during this period, but leaves intact the substantive provisions of the Act including, of course, the provisions under which the Board and this Court have power to act.

In view of the foregoing considerations, judicial review of the propriety of expenditures by the Board in enforcement proceedings would do violence to the doctrine of the separation of powers.[16] With due regard for the authority of "another and co-equal department" (*Massachusetts* v. *Mellon,* 262 U. S. 447, 488–489), the courts will not burden themselves with such matters. Like political questions, such internal financial matters would impose upon the court the duty of rendering a decision in spite of "the lack of satisfactory criteria for a judicial determination" (*Coleman* v. *Miller,* 307 U. S. 433, 454–455).

[16] While there is some doubt and conflict concerning the *raison d'être* of the doctrine of the separation of powers in our American jurisprudence, it is axiomatic that the doctrine is an integral part of our constitutional scheme. (See Frank, *When 'Omer Smote 'is Bloomin' Lyre*, 51 Yale L. J. 367–381 (1942), included in Frank, *If Men were Angels* (1942), pp. 223–235, discussing the conflicting theories advanced.)

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The sole question raised by respondent's request that the petition for enforcement be dismissed is whether the Board is making proper use of the funds appropriated for it by the Congress. It is patent that this raises a question exclusively within the province of the legislative department and therefore not subject to judicial scrutiny. The Congress has appropriated money for the Board's use during the fiscal year. The amount of such appropriation is a matter vested in the legislature and not cognizable by the courts. Nor is the use the Board makes of its funds a topic of judicial concern, regardless of the existence of a proviso specifying certain limitations upon the use of the appropriation. The problem is the same, and there is not a justiciable controversy, whether respondent asserts that funds are misused or, for example, claims that the appropriation has been exhausted and there are no funds with which the Board can prosecute the proceedings at bar. Such assertions are as irrelevant as a contention that a party cannot maintain a suit because of an alleged inability to pay costs or the alleged theft of the funds being used to maintain suit.

D

Respondent may not challenge the Board's use of its funds in connection with the instant proceeding

Finally, respondent has no standing to challenge the Board's use of its funds in connection with the instant proceeding. It is well settled that a Federal expenditure—even though (unlike that in the instant case) palpably unauthorized or illegal—may

not successfully be challenged by a litigant, in the absence of a showing of "direct injury" not suffered by the public at large, attributable to the unauthorized expenditure. (*Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478–480; *Duke Power Co.* v. *Greenwood County,* 302 U. S. 485, 490, aff'g 91 F. (2d) 665, 676 (C. C. A. 4); *Massachusetts* v. *Mellon,* 262 U. S. 447, 480–485, 486–488; *Fairchild* v. *Hughes,* 258 U. S. 126, 129–130; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 137–140. Cf. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125, 129, 131–132. See Note, 51 Harvard Law Review 897, 899–904 (1938).)[17] The term "direct injury" as used in these cases is "used in its legal sense, as meaning a wrong which directly results in the violation of a legal right" (*Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479).

Respondent's position in the instant proceeding is not such as to expose it directly to "violation of a legal right" as a result of the Board's expenditure of its funds to secure enforcement of its order. Respondent has violated the law as enacted in the National Labor Relations Act, and has been ordered by the Board, as the agency charged with administration of the Act, to cease its unlawful conduct and to take certain affirmative action to remedy the consequences

[17] This rule too rests, at least in part, upon the doctrine of the separation of powers. In recognition of the limitations upon its authority inherent in the constitutional separation of powers, the judicial department has enunciated certain rules of self-limitation. One of these is that a court will decline to review a legislative or executive act unless the party seeking such review has sufficient interest to challenge the action.

of its wrongful activities. Respondent has refused to comply with this order. All of this occurred prior to passage by Congress of the proviso to the Board's appropriation for the current fiscal year. The only damage respondent will incur by the Board's expenditure of its funds to secure compliance with its order is that it may be compelled to comply with that order and obey the law, which the public generally is likewise required to obey. Compulsion to obey a valid and lawful order, issued under a valid and existing law, may not possibly be regarded as violation of any "legal right" of respondent which the law will recognize (*Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479; *Duke Power Co.* v. *Greenwood County,* 302 U. S. 485, 490, aff'g 91 F. (2d) 665, 676–677 (C. C. A. 4); *Williams* v. *Riley,* 280 U. S. 78, 80; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 137–140; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125, 129, 131–132; *Central Illinois Public Service Co.* v. *Bushnell, Ill.,* 109 F. (2d) 26, 29 (C. C. A. 7); *O'Brien* v. *Carney,* 6 F. Supp. 761, 762 (D. C. Mass.)). Respondent obviously has no "legal right" to immunity from the Act, which the public at large is required to obey.

II

Respondent's acts of interference, restraint, and coercion were not constitutionally privileged

Respondent contends that the utterances of its officers and supervisors and the articles published in its house organ, *Friendly Forum,* on which the Board based findings of interference, restraint and coercion,

were constitutionally privileged under *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469; and *N. L. R. B.* v. *American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A. 2), cert. denied on October 18, 1943. Two important factors distinguish those cases from that at bar: (1) respondent's conduct here included express threats of economic reprisal; and (2) respondent's coercive activities formed a part of a course of conduct which included violations of the Act to which the claim of constitutional privilege cannot possibly be applied.

1. The expressly coercive nature of most of respondent's conduct cannot be questioned. The warnings that union organization would result in closing of the plant, originally expressed by Director of Personnel Livingstone and thereafter repeated to the employees by lesser supervisors (Board's main brief, pp. 5–6, 15), were in no sense expressions of opinion. Neither was the threat that "when you put that C. I. O. button on you are hanging out your neck. Somebody will take a crack at it" (Board's main brief, p. 16).

No such threats were involved in the *Virginia Electric* case; in fact, the Supreme Court expressly noted that:

> In determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways (314 U. S., at p. 477).

Similarly, the decision in the *American Tube* case rested expressly on the fact that the expressions of

employer preference there voiced contained "no intimation of reprisal against those who thought otherwise; quite the opposite" (134 F. (2d), at page 995).

Conversely the circuit courts have repeatedly held, in cases arising after the *Virginia Electric* decision, that where an "intimation of reprisal" does appear, constitutional privilege may not be claimed. In two of these cases the Supreme Court refused to review decisions favorable to the Board on the same day that it refused to grant review in the *American Tube* case. *N. L. R. B.* v. *William Davies Company,* 135 F. (2d) 179 (C. C. A. 7); *N. L. R. B.* v. *Trojan Powder Company,* 135 F. (2d) 337 (C. C. A. 3). In the *Trojan Powder* case, the Court noted that the series of statements in issue "lack[ed] the venom found in many other cases" and that there was "no threat explicit in the language used" (135 F. (2d) at p. 339). It concluded, however, that a threat could be spelled out of the statements, and upheld the Board's finding and order. Similarly, in the *Davies* case, the Court pointed out that "the circumstances are not numerous or particularly flagrant" (135 F. (2d) at p. 181) but held that:

> The slightest interference, intimidation or coercion by the employer of the employees in the rights guaranteed to the employees by the statute constitutes an unfair labor practice in violation of Section 8 (1) of the Act (135 F. (2d), at p. 181).

Finally, in *N. L. R. B.* v. *Crown Can Co.,* 13 L. R. R. 283, decided by the Circuit Court of Appeals for the Eighth Circuit, on October 25, 1943, one week after

the Supreme Court denied the petitions for writ of certiorari in the *American Tube, Davies,* and *Trojan Powder* cases, the Court held that threats to close a plant were not within the protection of the Constitution, saying:

> "Free speech" does not mean license to violate valid laws, such as laws against perjury, libel, slander, or laws against restraint or coercion of employees in the exercise of their rights under the Act.[18]

2. The long course of unfair labor practices engaged in by respondent here also serves to distinguish the *American Tube* case. There, the record contained nothing but "the letter and the speech [of the employer] together with the occasion—a coming election—on which they were uttered" (134 F. (2d) at p. 995). The importance of considering the record as a whole is clearly revealed by the *Virginia Electric* case. There the Court held that "it does not appear that the Board raised [the utterances] to the stature of coercion by reliance on the surrounding circumstances." It further concluded that "if the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone" (314 U. S., at p. 479). After reconsideration of the entire case by the Board, its findings were upheld by the Court because "while the bulletin * * * and the speeches * * * are still stressed, they are considered not in isolation but

[18] See also *N. L. R. B.* v. *Van Deusen*, decided November 4, 1943, 13 L. R. R. 321, 322 (C. C. A. 2).

as a part of a pattern of events adding up to the conclusion of domination and interference" (*Virginia Electric & Power Company* v. *N. L. R. B.*, 319 U. S. 533, at 539). The record in the instant case makes it clear that the Board's findings are grounded upon respondent's whole course of conduct, and that the coercive statements of respondent's officers and supervisors are viewed, not in isolation, but in relation to the whole complex of respondent's course of interference, restraint, and coercion. Thus, in summing up its findings as to the unfair labor practices, the Board listed together the management's threats to close the plant if the Union were organized, inquiries as to union membership among employees, the employment of Porter to engage in espionage, and the distribution of antiunion articles in *Friendly Forum*, as constituting restraint, interference, and coercion (R. 73).

Respectfully submitted.

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DECEMBER 1943.

APPENDIX A

COMPTROLLER GENERAL OF THE UNITED STATES,

Washington 25, July 29, 1943.

B–35803

Chairman,

NATIONAL LABOR RELATIONS BOARD.

MY DEAR MR. MILLIS:

I have your letter, without date, received in this office July 20, 1943, reading as follows:

> The Act making appropriations for the Department of Labor, the Federal Security Agency, and related independent agencies for the fiscal year ending June 30, 1944 (Public 78th Congress) contains the following provision:
>
> "No part of the funds appropriated in this title shall be used in any way in connection with a. complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed. *Provided,* That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested persons."
>
> The National Labor Relations Board requests the decision of the Comptroller General concern-

ing two questions which arise from the above-quoted language:

1. Does the phrase "without complaint being filed" refer to "charges" filed pursuant to Section 10 (b) of the National Labor Relations Act, or does the phrase refer to "complaint" issued by the Board pursuant to Section 10 (b)?

Reference to Section 10 (b) of the National Labor Relations Act will show that when a charge has been filed alleging that any person has engaged in or is engaging in an unfair labor practice, the Board has power to issue and cause to be served upon such person a complaint stating the charges. In the normal case, when a charge alleging unfair labor practices is lodged with a Regional Office of the Board, an investigation is instituted to determine whether the facts appear to justify issuance of a complaint, and whether the Board has jurisdiction to proceed further in the matter. The purposes of such an investigation require that the case be assigned to an agent, that conferences be held with the parties, and that facts be ascertained in order to enable the responsible officials of the Board to decide whether a complaint should be issued. The ambiguity in the phrase quoted in the first question presented for your consideration arises out of the fact that charges are *filed* by any person desiring to call to the attention of the Board the alleged commission of an unfair labor practice, whereas, complaints are *issued* by the Board after an investigation of the charges.

The purpose of the amendment, as well as its legislative history, indicates that the intention of Congress was to limit the use of funds to cases in which *charges* had been filed within three months of execution of a labor agreement. This is made clear by the following statement of Congressman Hare, who introduced this amendment to the Appropriation Act:

"Where an agreement between management and its employees has been in operation for as long as 3 months or more and no complaint has been filed by management or no *formal complaint filed by the employees,* N. L. R. B. would not have jurisdiction and would be relieved of any duty or expense until the availability of these funds expires." [Italics supplied.] (Cong. Record, 78th Congress, 1st Session; Wednesday, June 16, 1943, p. 6047.)

Senator Brewster, in explaining the amendment on the floor of the Senate, likewise made clear the intent of the rider in the following language:

"I think it should be clear that the complaint to which the amendment refers will be filed by the labor organization" (Cong. Record, 78th Congress, 1st Session, Saturday, June 26, 1943, p. 6648).

The Board desires your opinion whether the Board's understanding is correct that the three-month limitation applies to cases in which a charge has not been filed in the requisite period.

2. Is the phrase "complaint case arising over an agreement" to be construed to prohibit the use of funds in connection with cases which, prior to July 1, 1943, had been decided by the Board?

The view of the Board is that a "complaint case" refers to a case "in the complaint stage," i. e., in the stage preceding the issuance of a Board decision and order. Any other construction would be in conflict with the legislative history of the amendment and with the provisions of the National Labor Relations Act relating to enforcement and review of Board orders.

A. Legislative History.

The legislative history of the amendment shows that its purpose is to prevent the Board from proceeding to a decision and order in the cases pending before the Board and known

upon the records of the Board as *Matter of Oregon Shipbuilding Corporation and Industrial Union of Marine and Shipbuilding Workers of America; Matter of Oregon Shipbuilding Corporation* and *William King, an individual;* and *Matter of Kaiser Company, Inc.,* and *Industrial Union of Marine and Shipbuilding Workers of America, et al.;* Cases Nos. XIX–C–997; XIX–C–1055; XIX–C–1101. These cases are popularly known as the "Kaiser Shipbuilding Cases," and involve complaints based upon charges that the respondent corporations had discriminatorily discharged certain employees pursuant to closed-shop contracts which were alleged to have been invalid, hence not a defense to the charges of discrimination.

The amendment to the Appropriations Act was urged at the Hearings on the Labor-Federal Security Appropriation 1944, before the Subcommittees of the Committees on Appropriations of the House of Representatives and of the Senate, by John P. Frey, President, Metal Trades Department, American Federation of Labor. Mr. Frey, who represented the A. F. of L. Unions, which were the beneficiaries of the allegedly illegal contracts with the Kaiser companies, proposed the amendment which, in his words, "would make it impossible to do what is being done in the *Kaiser case* and those which we know are to follow." (Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 1st Sess., on the Department of Labor-Federal Security Agency Appropriation Bill for 1944, Part 1, page 427.)

Mr. Frey's testimony before the Senate Subcommittee reveals that the sole purpose of the amendment was to prevent the Board from deciding the *Kaiser cases* and from proceeding in the future to issue complaints in similar cases. (Hearings, pp. 322–346.) Thus, Mr. Frey stated:

"If I may be permitted to say this, the problem presented in this case (*Kaiser cases*) and in the action of the National Labor Relations Board is without precedent. * * * (p. 334.)

"It (the amendment) would prevent the raiding which is now going on and which would cease instantly throughout the country if the N. L. R. B. would *cease hearing these complaint cases* involving trade-union agreements with employers. [Italics supplied.] (p. 343.)

"The case that has attracted the most attention is the *Kaiser case*. The C. I. O. has prepared complaint cases of a similar nature against two yards in San Francisco, three of the yards in Los Angeles, three of the yards on the Gulf, four of the yards in Florida, and three in the South Atlantic region. Now, it is the intention, if this *Kaiser case* proceeds to go down the line, to have a repetition of what we have gone through in turmoil and friction in the other shipyards. * * * The *Kaiser case* is symptomatic of the danger that exists" (pp. 344–345).

The debates on the floor of both Houses show unmistakably that the purpose of the amendment was to prevent the Board from deciding the *Kaiser cases* and from issuing complaints during the 1944 fiscal year in similar cases.

The following excerpts from the debates reveal this intention:

1. It (the amendment) merely applies to the agreement in existence at the time, worked out between the A. F. of L. and other labor groups and management, in the Pacific coast yards (Sen. Bridges, Cong. Rec., 78th Cong., 1st Sess., p. 6648).

2. Mr. Kaiser cooperated completely with the suggestion of the Government that there be the closed shop, although it was not put into the stabilization agreement. This amendment merely says that the agreements entered into in

that fashion shall not now be reopened (Sen. Brewster, id., p. 6648).

3. Now, one thing is clearly apparent, and that is that this threatened interposition of the N. L. R. B. in the affairs of the two Kaiser shipyards in question is almost certain to bring about very material interruption in the very fine record being made by those yards in the building of ships for the war effort. This is not a permanent amendment to the National Labor Relations Act. This is an emergency measure. It is only to be effective for the 12 months that this appropriation bill is effective, and it is intended to prevent during those 12 months the interruption of production in those two shipyards or in any other plants which are similarly situated * * * (Congressman Tarver, Chairman of Approp. Committee, Cong. Rec., 78th Cong., 1st Sess., p. 7026).

4. I have no hesitancy in saying that this amendment represents the position of the American Federation of Labor. Its representative came before our committee and clearly made its position known. There should be no misunderstanding about that at all. There is no doubt in my mind but what it was precipitated by the situation that exists out in the Kaiser yard (Cong. Keefe, Cong. Rec., 78th Cong., 1st Sess., p. 7026).

5. We heard all sides of the controversy, and this amendment is merely the result of the desire on the part of the American Federation of Labor on the west coast to maintain an agreement which was entered into by a very small number of men employed in the plant of Mr. Kaiser (Sen. Truman, Cong. Rec., 78th Cong., 1st Sess., p. 7103).

It is therefore apparent from the legislative history of the amendment that it was not intended to preclude the Board from proceeding during the fiscal year 1944 to obtain court enforcement of any order issued by the Board prior to July 1, 1944 [1943].

B. Provisions of the National Labor Relations Act.

This intention is likewise confirmed by the provisions of the National Labor Relations Act which draw a distinction between a "complaint" (when a case is before the Board up to the time of the making of its order) and a "proceeding" to review or enforce a Board order (which occurs subsequent to Board order). Thus, Sections 10 (a), (b), and (c) described the method of instituting a case before the Board. Reference to the language of these sections reveals that upon the filing of a charge of the commission of an unfair labor practice, the Board may issue a *complaint* and serve it upon the appropriate parties. Provision is made for the amendment of such a *complaint,* for the filing of an answer to such a *complaint,* for a hearing thereon, and for the making of an order sustaining or dismissing such a *complaint.* After that point of Board decision and issuance of an order, the statute adopts entirely different language in reference to *proceedings* to be had before appropriate reviewing courts. Thus, in Sections 10 (e), (f), and (g)—prescribing procedures before the courts subsequent to Board order—repeated reference is found to such proceedings. In Section 10 (e) it is provided that, "Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction *of the proceeding.* * * *" In Section 10 (g) it is provided that, "The commencement *of proceedings* under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order."

For these reasons it appears clear that when a petition for enforcement or review of a Board order is filed in a Circuit Court of Appeals, the case is not a "complaint case," *i. e.,* a case before the Board, but is an "enforcement case," *i. e.,* a case exclusively within the jurisdiction

of the Court. As the Board described it in its Statement to the Appropriations Committee: "At this point the case belongs to the court" (House Hearings, p. 316).

Moreover, after court decision and decree, the only means of enforcing Board orders is through the utilization of the inherent power of the courts to make their decrees effective. Only the National Labor Relations Board has power to invoke this power through the filing of contempt proceedings in the courts. *Amalgamated Utility Workers* v. *Consolidated Edison Company,* 309 U. S. 261, 269. Such a proceeding is of course in no sense "a complaint case," but, like other action subsequent to Board order, a strictly judicial proceeding.

It is to be noted in this connection that the National Labor Relations Act expressly vests in Board attorneys the right to "appear for and represent the Board in any case in court." (Act, Sec. 4 (a).) Pursuant to this provision, the litigation of the Board has been and is conducted by staff attorneys under the direction of the Board's General Counsel. Congress was aware of the statutory provision and of the Board's practice: a description of the Board's practice in this respect was given to the Appropriations Subcommittees of both Houses in the Hearings on the 1944 Appropriations Act (Hearings before Senate Subcommittee, p. 295; Hearings before House Subcommittee, p. 355).

It would appear to follow that as to those cases which had been decided by the Board and which were pending in the courts at the beginning of the fiscal year, the courts have exclusive jurisdiction and the Board is not deterred by the amendment from taking such action in the court proceedings as is required by the statute and by the rules of court.

In summary, it is the view of the Board that the amendment was not intended to prohibit, and should not be construed as prohibiting, the

Board from proceeding to litigate in the courts any cases in which the Board has issued its decision and order. We are transmitting herewith copies of the National Labor Relations Act and the Hearings and Debates relating to the amendment. The Committee Reports on the Appropriations Act contain no reference to the amendment, which was introduced in Congress after the respective Committees had submitted their Reports.

Section 10 (b) of the National Labor Relations Act, approved July 5, 1935, 49 Stat. 449, which represents basic legislation establishing the jurisdiction of the National Labor Relations Board, provides:

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

So far as your first question is concerned, since the obvious purpose of the statutory provision contained in the Labor-Federal Security Appropriation Act, 1944, approved July 12, 1943, Public Law 135, quoted in your letter, is to curtail to a certain extent the statutory jurisdiction of the National Labor Relations Board, it would seem necessary, in the absence of indicia of a contrary intention, that the word "complaint" contained therein be construed in the light of the meaning of that word as it appears in the act of July 5, 1935, *supra.* It is clear that the "complaint" in the latter act has reference to an action instituted by the Board, and would appear to be similar to a declaration in a suit at common law. But, as you point out in your letter, such a complaint is *issued* by the Board after charges of unfair labor practices are *filed* by any person desiring to call the matter to the attention of the Board. Hence, there is room for doubt as to whether in employing the term "without complaint being filed" in the act of July 12, 1943, the Congress had reference to the complaint *issued* by the Board or the charges *filed* with the Board under the provisions of the act of July 5, 1935.

Under these circumstances, there appears justified a reference to the legislative history of the provision in question, particularly to the debates and the hearings before the Congressional committees involved, in order to determine the legislative intent. See *Blake* v. *National Banks,* 23 Wall. 307; *United States* v. *Dickerson,* 310 U. S. 554; *United States* v. *American Trucking Association,* 310 U. S. 534. In the last cited decision, wherein the Supreme Court of the United States referred to the debates on the floor of the Senate and the Congressional committee reports as aids in construction of the statute, the court said:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words

by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." * * *

The portions of the debates on the provision in question quoted in your letter show clearly that the members who sponsored the provision regarded the term "complaint" as the charges which are filed by employees or management with the Board. In addition thereto, an examination of the debates on the measure discloses the following statements:

Mr. HARE. * * *

The committee feels that we can relieve this Board of some of its duties and responsibilities by placing a limitation on the appropriation which would relieve the Board of the necessity of having to consider complaint cases arising on agreements between management and labor where the agreements have been in existence for 3 months or longer. In order words, where contracts have been in operation for 3 months or longer and *no complaint has been filed with the National Labor Relations Board* the National Labor Relations Board would be relieved of the necessity of going in and taking jurisdiction any time within the next 9 months, or during the

life of this appropriation. * * * [Italics supplied.] (Cong. Record, June 16, 1943, page 6046.)

Mr. WHITTINGTON. I should like to ask the gentleman from South Carolina if any of the funds appropriated here are used by that Board to investigate cases where management and labor are undertaking to reach an amicable agreement, so that both will have a voice in the management and operation of the affairs of the company? What do the hearings disclose with reference to that?

Mr. HARE. I am not sure that I understand the gentleman's question.

Mr. WHITTINGTON. Whether the Board is expending public funds to investigate cases where management and labor are trying to get together in the solution of their problems?

Mr. HARE. *Not unless either management or labor has filed a request* with the board to assist in that effort.

Mr. WHITTINGTON. *And unless that request is filed within 3 months no part of these funds will be available.*

Mr. HARE. *That is correct.* [Italics supplied.] (Cong. Record, June 16, 1943, page 6047.)

Mr. HARE. If a contract has been in force for 3 months and the individual has been satisfied with it for 3 months he will have notice of it all of this time. If he has been satisfied with it for 3 months and someone comes along and makes him dissatisfied, then he is estopped for the next 9 months *from filing a complaint and being considered by the National Labor Relations Board.*

* * * * *

Mr. HARE. That is right. *If he acquiesces in it for 3 months and makes no complaint,* the idea is that he is satisfied. He has had plenty of time to consider it, plenty of time to deliber-

> ate. If somebody comes along and makes him dissatisfied after that, then he is stopped from expressing his dissatisfaction. * * * [Italics supplied.] (Cong. Record, July 1, 1943, page 7024.)

The foregoing would appear to demonstrate clearly that the term "complaint" was used by the Congress in the sense of an assertion of a grievance by labor or management with respect to unfair labor practices. In that connection, it appears from your submission that under the existing procedure of the Board when a charge is filed alleging unfair labor practices, a preliminary investigation is undertaken to determine the propriety of issuing a complaint. It is understood that such investigation often discloses that the charges are unfounded and, in many instances, affords an opportunity to the parties involved for the amicable adjustment of the issues, thus obviating the necessity for the issuance of a complaint by the Board. If it were held that the provision here involved refers to the complaint issued by the Board, it is apparent that in many cases the Board would be confronted with the necessity of establishing charges which it has had no opportunity to investigate. I find nothing in the legislative history of the measure which evinces a Congressional purpose to regulate the established procedure of the Board in that respect. Accordingly, I agree with your view that the provision in question limits the use of funds to those cases in which charges have been filed with the Board within three months of the execution of a labor agreement, but prescribes no limitation as to the time within which a complaint may be issued by the Board.

With respect to your second question regarding the scope of the term "complaint case" appearing in the provision here involved, for the reasons stated in

your submission it is deemed proper to conclude that the Board is not precluded from expending from its appropriation such amounts as may be necessary in connection with further proceedings in those cases as to which a decision and order were issued by the Board prior to July 1, 1943.

The enclosures transmitted with your letter are returned herewith.

Respectfully,

[S] LINDSAY C. WARREN,
Comptroller General of the United States.

Enclosures.

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 10383.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THOMPSON PRODUCTS, INC.,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT.

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SUPPLEMENTAL BRIEF OF RESPONDENT.

This Supplemental Brief in reply to the Supplementary Memorandum of Petitioner is filed pursuant to permission of the Court. We reply herein to the arguments of the petitioner on the following two issues: (1) Whether a rider in the Board's Appropriation Act for the current fiscal year requires the Court to refuse to grant the petition for enforcement; and (2) Whether certain statements made by respondent were constitutionally privileged as an exercise of free speech.

I.

The Petition for Enforcement of the Board's Order Must Be Denied Under the National Labor Relations Board Appropriation Act, 1944, Which Stabilizes Bargaining Relations for the Duration.

In its Supplemental Brief, petitioner presents four arguments in answer to our contention that the Board's petition for enforcement of its order must be denied under the National Labor Relations Board Appropriation Act, 1944 (Title IV, Labor-Federal Security Appropriation Act, 1944, Pub. 135, Chap. 221, 78th Cong., 1st Sess., H. R. 2935, Approved July 12, 1943), and contends that in three cases this issue has already been determined contrary to our position. We will separately consider these four arguments, but at the outset we wish to point out that the issue here presented has not yet been decided by any court.

The first case relied upon by petitioner is that of *National Labor Relations Board v. Cowell Portland Cement Co.*, Case No. 10374 (C. C. A. 9th), ruling from the bench September 7, 1943. In its Reply Brief herein, petitioner said of the above case:

> "The Board is advised by its counsel that the grounds of the Court's action, as indicated by statements of the members of the Court at the oral argument, are applicable here."

By a letter dated September 28, 1943, from Howard Lichtenstein, Assistant General Counsel of the Board, we were "advised that the Board is striking from pages 1-2

of its reply brief the following [foregoing] statement." By this action petitioner conceded that the *Cowell* decision was not applicable here.

The ruling in the case of *National Labor Relations Board v. Baltimore Transit Co.,* Case No. 5103 (C. C. A. 4th), October 5, 1943, may have been made on several grounds not applicable here. In the first place, that case did not come within the scope of the Hare rider since a "complaint" had been filed within three months from the execution of the contract involved. Moreover, the ruling may have been decided on the ground, as the Board then contended, that the rider did not apply where the union was company-dominated (see 13 Lab. Rel. Rep. 165), a proposition now conceded by the Board to be erroneous (Petr. Supp. Memo., p. 10, note 10; footnote 15, *infra*).

The ruling in the case of *National Labor Relations Board v. Elvine Knitting Mills, Inc.,* 138 F. (2d) 633 (C. C. A. 2d, Oct. 26, 1943), was decided at least in part on the same erroneous ground. That case also involved a contract with a company-dominated union, and the Court sustained the Board's then position that for this reason "the present is properly not a case involving a labor agreement of the kind described in the statute." Moreover the Court noted that the "respondent substantially conceded at the argument" the Board's contentions. We do not concede them, and so far as appears this is the first case where a Court will have to squarely decide the issue presented and where the issue has been fully argued.

A. The "Hare Rider" to the National Labor Relations Board Appropriation Act, 1944, Amended the National Labor Relations Act.

Petitioner concedes, as it must, that under the decision of the United States Supreme Court in *United States v. Dickerson,* 310 U. S. 554, 60 S. Ct. 1034 (1940), "Congress can amend or repeal substantive legislation 'by an amendment to an appropriation bill, or otherwise'" and that the question here is whether Congress did so. We are also in agreement with petitioner that that question is resolved by determining the Congressional intent. We submit that an examination of the legislative history of the bill involved discloses beyond any reasonable doubt that Congress did intend to amend the National Labor Relations Act. This appears from the purpose of the legislation, direct statements on the floor of Congress (even those relied upon by petitioner as allegedly establishing the contrary), and repeated statements of objection by Congressmen to the enactment of substantive legislation in an appropriation bill. For the convenience of the Court, we will discuss the legislative history of the bill in detail.

During the course of hearings held by the House Subcommittee of the Committee on Appropriations on Labor Department and Federal Security Appropriations (May 29, 1943), John P. Frey, President of the Metal Trades Department of the American Federation of Labor voiced bitter objection to the action of the National Labor Relations Board in taking jurisdiction and in holding hearings in the case involving the Kaiser shipyards and similar cases for the purpose of setting aside existing collective bargaining agreements with unions allegedly not the proper representatives of the employees at the time the contracts were entered into. This action, under the Wagner Act,

it was asserted would cause considerable unrest and would have a disastrous effect on production. As a result of this statement and similar reports from other sources, when the Appropriation Bill was up for debate in the House on June 16, 1943, Representative Taber, a member of the Committee on Appropriations, offered an amendment to reduce the appropriation for the National Labor Relations Board by $500,000, or approximately one-fourth, scoring the Board in the following language (89 Cong. Rec. 6046)[1]:

> "I have done this because the Board, instead of attending to its own business, has gone out trying to promote labor disturbances between the different labor organizations. They have been caught at it red-handed. and the situation is such that out on the west coast they have attempted to create differences between two labor unions in the Kaiser shipyard and upset an agreement which has been of long standing with one of the organizations. When an organization of the Government gets into that kind of business it is time we put a crimp in some of their activities."

Representative Hare, Chairman of the Subcommittee, who introduced and was in charge of the bill, immediately opposed the proposed amendment on the ground that (p. 6046) "I do not see where the matter that he complains of would be corrected by reducing the appropriations" but would render the Board incapable of effectively carrying out its functions. He pointed out that if the proposed Taber amendment carried he would offer a specific amendment designed to correct the evil complained of.

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[1]Unless otherwise indicated, all page references hereinafter are to Volume 89 of the Congressional Record, 78th Congress, 1st Session.

Taber's amendment carried, and Hare then offered his proposed amendment to the bill adding the following proviso to the appropriation for the Board (p. 6047):

> "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for 3 months or longer without complaint being filed."

He explained the purpose of his amendment as follows (p. 6047):

> "It simply means that the National Labor Relations Board will not be charged with the responsibility, nor will it have the authority or right to take jurisdiction of a complaint unless the contract under which the complaint is made has not been in force for as much as 3 months. Where an agreement between management and its employees has been in operation for as long as 3 months or more and no complaint has been filed by management or no formal complaint filed by the employees, National Labor Relations Board would not have jurisdiction and would be relieved of any duty or expense until the availability of these funds expires."

After very brief discussion and with no apparent opposition, the amendment was agreed to (p. 6047). The bill was passed the same day.

During the course of the hearings held on the bill by the Subcommittee of the Committee on Appropriations of the Senate, the Subcommittee on June 22, 1943 took up the matter of the Hare rider to the bill. At the outset of this discussion the Subcommittee introduced in the record a short, one page written statement presented by the Na-

tional Labor Relations Board and a copy of a press release issued by the Board on June 18, 1943 (Hearings, p. 288). The Board opposed the Hare rider in the second part of the statement, under the heading: "II. *Substantive Amendment* of the National Labor Relations Act." Similarly in the press release, the Board complained "of the *amendment* to the National Labor Relations Act, adopted in the heat of debate yesterday." Further, Gerard D. Reilly, acting chairman of the National Labor Relations Board, opposed the Hare rider, defended the Board's action in the Kaiser case, and objected that (Hearings, p. 304) the amendment "goes much further than merely placing cases like the *Kaiser case* beyond our *jurisdiction*. . . . It would *legalize* contracts with company-dominated unions."

During the course of the statement made before the Subcommittee on the same day by Mr. Frey, Senator Truman expressed objection to the Hare rider on the grounds (Hearings, p. 336) that he did "not want to hamstring the Wagner Act, and I believe this amendment would absolutely put the Wagner Act out of business" and that the matter should be handled by legislative committees.[2]

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[2]"Senator TRUMAN. But I am afraid of yellow-dog contracts and several other things that could creep in. I agree that there ought to be a statute of limitations, but that ought to be done by the legislative committees of the House and the Senate, and it ought to be done very carefully." (Hearings, p. 336.)

"Senator MEAD. As I understand the observations made by Senator Truman, his mind is not closed on the subject. He feels rather kindly toward the treatment of this matter by a legislative committee. In doing so, he is anxious to protect the rights of labor from the yellow dog contracts and other weakening influences.

"Senator TRUMAN. I think it is the most important thing that has been done since the Wagner Act was passed. I think it ought to be handled by a legislative committee, which can get the job done in the way it should be done. Stabilization is what we are after." (Hearings, pp. 343-344.)

Following the statement of Mr. Frey, Hoyt S. Haddock, legislative representative of the C.I.O., appeared before the Subcommittee and made the following pertinent comments (Hearings, p. 346):

> "However, the fact is that the amendment was not offered under circumstances which could possibly be conceived as appropriate or legitimate. *The amendment obviously contemplates a change in the substance of the National Labor Relations Act.* It *is not something that has to do merely with finances.* This practice of attempting to alter the provision of substantive legislation by riders attached to appropriations is a practice which is morally indefensible. It perverts the normal procedures of legislation and is an insult to the integrity and intelligence of both Houses of Congress. I know that this body has frowned upon it. I sincerely trust that this kind of maneuver in this instance will be rejected in terms so unmistakable and blunt as to discourage tactics of this kind in the future."

On June 24, 1943, the Senate Committee on Appropriations submitted its report on the bill (S. Rep. 342, p. 4) in which it recommended that the Hare rider be stricken. When this proposed committee amendment was taken up for consideration in the Senate on June 26, 1943, Senator Bridges offered a substitute for the proposed Committee amendment, adding the following to the Committee's bill (p. 6648):

> "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor, copy of which has been filed with the Labor Department for 3 months or longer without complaint being filed by a labor organization."

It should be noted that except for one change this proposed amendment was word for word the same as the Hare rider and the provision finally enacted. The only difference was that Bridge's proposal required the labor agreement to be filed with the Department of Labor for three months in order to prevent it from being attacked, whereas in the Hare rider it was only required that the agreement have been in existence for three months. This change in language was designed to meet one objection voiced by the Board during the course of the Senate Subcommittee hearings, and that was that agreements could be entered into and kept secret for three months and then they would no longer be subject to attack. Set forth below is the provision finally adopted. The Hare rider consisted of that part preceding the "Provided", and the Bridges amendment was the first twenty-nine words of the Hare rider with the additional words set forth in square brackets:

> "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor [, copy of which has been filed with the Labor Department for 3 months or longer without complaint being filed by a labor organization.] which has been in existence for three months or longer without complaint being filed: *Provided,* That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person."

During the course of debate on Senator Bridges' proposed amendment, objection was voiced on the ground that

the National Labor Relations Act should not be amended without the matter being considered by a legislative committee.[3] Senator Truman, who had expressed himself during the Subcommittee hearings as being opposed to the Hare rider, likewise opposed the Bridges amendment on the ground (p. 6649)[4] that if the amendment were adopted "it will not go to conference, and it is most dangerous *to legislate* in this manner in an appropriation bill. . . . I do not believe we should *repeal the National Labor Relations Act* through an amendment offered on the floor of the Senate, without any consideration of the committees of the House and the Senate having to do with Labor matters. *That is exactly what this amendment would do.*"

Senator McCarran, Chairman of the Subcommittee in charge of the bill, objected to the proposed amendment on the same grounds, during the course of which he made the statements quoted in petitioner's Supplemental Brief (page 8, note 7) as allegedly indicating that the proviso finally adopted did not amend the Wagner Act. As a matter of fact, these statements, which we quote in full, clearly establish that the effect of the rider was to amend the Wagner Act and it was because of that fact that Senator

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[3]"Senator Lodge. ". . . My confusion in regard to this proposal is a good illustration of why matters of this kind should go to legislative committees, and not appropriation committees" (p. 6648).

[4]"Mr. Truman. In the condition in which the committee amendment now is, it will go to conference, and any change the Senator from New Hampshire [Mr. Bridges] might want may then be considered by the conferees. If the Senator's amendment shall be adopted, I am very sure it will not go to conference, and it is most dangerous to legislate in this manner in an appropriation Bill.

"I listened to my able colleague from Maine [Mr. Brewster], who is on the special committee with me, and he stated the facts as they are, but I do not believe we should repeal the National Labor Relations Act through an amendment offered on the floor of the Senate, without any consideration of the committees of the House and the Senate having to do with labor matters. That is exactly what this amendment would do."

McCarran opposed the Bridges Amendment. It must not be overlooked that the proposed amendment of Senator Bridges, except for the provision requiring labor agreements to be filed or notice thereof posted, was identical with the Hare rider and the provision as finally enacted. His proposed amendment, therefore, so far as the question here under consideration is concerned, would have had the same effect as the provision finally enacted. Senator McCarran, whose committee had recommended striking out the Hare rider without offering any substitute, while agreeing that stabilization of labor relations was desirable, opposed the Bridges' amendment because such legislation should not be enacted in appropriation bills and because if the amendment were adopted, since it was practically identical with the Hare rider, the House would also approve it and the matter would not even go to conference to work out an entirely satisfactory provision. Thus when Senator McCarran stated (as quoted by petitioner) in opposing the Bridges Amendment that (p. 6650) "The Senate Committee has identically the same idea that the Senator from New Hampshire [Bridges] has in many respects, but we do not in appropriations bill propose to amend or alter or nullify a legislative act which has been passed by Congress and which has received Executive approval;" he was objecting to the Bridges amendment because that is exactly what it would do. Yet, as noted, the final provision was in identical language with the Bridges amendment, except for the filing requirement, and would have the same effect. Senator McCarran was immediately asked if he was "in sympathy with the objective of stabilizing labor relations at this critical period" and whether "any appropriate language designed to prevent the reopening of, let us say, somewhat aged con-

tracts, would be in accord with the Senator's views?" He replied, "Yes", and commented (p. 6650) "All members of the committee are in favor of stabilizing labor conditions, and *if* we could so do without destroying the Wagner Labor Relations Act, we would. At the same time, we do not *want to* destroy an act which has been passed by Congress after long debate and consideration." Senator McCarran's hope, as set forth in the foregoing statement (quoted by petitioner) that the Wagner Act could be saved from nullification by rewriting the disputed provision in conference was not realized, because the language of Senator Bridges' amendment and the Hare rider was adopted finally. This is further shown by the discussion that immediately followed, set out in footnote,[5] which includes the third quotation of Senator McCarran set forth in petitioner's brief.

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[5]"Mr. SHIPSTEAD. I may have misunderstood the Senator who is in charge of the bill. I understood him to say he did not think this matter was one which should be handled on an appropriation bill.

"Mr. MCCARRAN. I said, or at least I intended to say, that I did not think an appropriation bill was the proper place in which to set aside the force and effect of a legislative act.

"Mr. SHIPSTEAD. Does the Senator think that in conference a satisfactory amendment could be worked out which would not do that, and yet at the same time would achieve a remedy for the situation?

"Mr. MCCARRAN. My wish will be the father of my thought, and I express my thought, and say I hope so. That is all I can say. But if the amendment of the Senator from New Hampshire should prevail, I am confident it would tie the hands of the conferees.

"Mr. BREWSTER. Mr. President, will the Senator yield?

"Mr. BRIDGES. I yield.

"Mr. BREWSTER. The Senator from Nevada will agree, I am sure, that the mere enactment of a statute of limitations would not be considered as vitiating the act.

"Mr. MCCARRAN. No; and that is just what we do not want to accomplish. We want to provide limitations which will be wholesome for the welfare of the country in this unhappy hour, but we do not want to vitiate the act" (p. 6650).

After the above discussion, Senator Bridges withdrew his amendment, stating (p. 6651):

> "Mr. President, so far as I am concerned, I am willing to accept the statement of the chairman of the committee, and not to force at this time the amendment I have offered, with the understanding that the problem of stabilization of conditions in labor relations will be considered, and that we shall have some settlement along that line."

To this Senator McCarran replied (p. 6651):

> "Mr. President. I am afraid the Senator has used language with which I would not want to go along. I would not go that far. So far as the stabilization of labor conditions in the country at the present time is concerned, I think I speak for the entire committee when I say that we are in favor of doing anything and everything reasonable to stabilize conditions. But we cannot say to the Senator, and I will not say to him, that we will go so far in dealing with the subject *as to set aside an existing statute*. I would not be so unfair to the Senator as to say that."

Thus, Senator McCarran cautioned that the conferees might not go so far as the Bridges amendment and "set aside an existing statute." Yet the final provision did not change Bridges' language. Consequently, the statements of Senator McCarran, in charge of the bill, establish conclusively that the effect of the rider to the appropriation bill was to amend the Wagner Act.

In view of the understanding that the matter would go to conference with some effort to be made to stabilize labor relations without, if possible, repealing the Wagner

Act, as Bridges amendment proposed, the committee's amendment striking out the Hare rider was approved without further discussion (p. 6656).

The conference committee submitted its report on June 30, 1943, in which it proposed without comment that the Hare rider be restored *verbatim* and the proviso added relative to posting a notice of the agreement (p. 6961). In the House, on July 1, 1943, Hare of South Carolina moved to adopt the conference recommendation. Representative Smith of Virginia, the most persistent and vigorous critic in the House of the National Labor Relations Board, opposed the proposal because of its effect in amending the Wagner Act, stating (p. 7023):

> ". . . If you vote for the motion of the gentlemen from South Carolina you *amend* the National Labor Relations Act by taking away the *jurisdiction* of the National Labor Relations Board to investigate these contracts . . ."

To this Representative Tarver, a member of the subcommittee and a conferee, replied (p. 7023):

> "The purpose of the amendment has been correctly diagnosed by the gentleman from Virginia . . .
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> "Those who entertain the views of the gentleman from Virginia, that the National Labor Relations Board jurisdiction in that case ought not to be removed should, of course, support his motion . . ."

Mr. Tarver subsequently pointed out that (p. 7026):

> "This is not a *permanent* amendment to the National Labor Relations Act. This is an emergency measure."

As on each occasion before when this matter was discussed, objection was voiced to the enactment of substantive legislation in an appropriation bill,[6] Representative Smith stating in this connection (p. 7023):

> ". . . It is impossible to predict what may be the ultimate effect of trying to write such an *amendment* to the Labor Relations Act in an appropriation bill here on the floor of the House when 9 out of 10 Members do not understand what it is."

The spectacle of Representative Smith, who at one time was chairman of a House committee that investigated the National Labor Relations Board, defending the Wagner Act caused one representative to ask (p. 7023), "Is the gentleman defending the National Labor Relations Board at the present time?" to which Mr. Smith replied, "I am defending the act of Congress as it is and I am defending the jurisdiction of the Board to do the things that the Congress told them to do."

In its Supplemental Brief (p. 7) petitioner quotes a statement to Representative Hare that "There is no attempt to amend the National Labor Relations Act." When that sentence, occurring in the middle of a paragraph, is examined in the light of the discussion immediately preceding it, there can be no question that Mr. Hare only meant that the Wagner Act was not vitiated

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[6]"Mr. O'Neal. ". . . What evil is there in the existing law that requires a committee to take some legislative action on an appropriation bill?" (p. 7024).

"Mr. Anderson. [A member of the Subcommittee and a conferee.] . . . Personally I felt the place to iron out labor legislation was before the proper legislative committees of the House and not before the Appropriations Committee. I do think it is bad legislation, but I certainly was in no position to be an expert upon it, and I simply went along with the group" (p. 7025).

because employees would still be protected thereunder. Representative Smith was objecting to the proposal on the ground that it prevented employees from selecting their bargaining agent under the Wagner Act. Hare replied that this was not so, the employee was still protected under the Wagner Act; all that the amendment did was to prevent him from changing his mind after three months during which period he could attack any collective bargaining agreement before the NLRB. We quote Representative Hare's statement in full in the footnote.[7] On the other hand, when an employee filed a complaint after notice of an agreement had been posted for three months as required, then, according to Hare (p. 7025), "The Board would not have jurisdiction to investigate that case." The conference report was adopted without much further debate (p. 7027).

In the Senate on July 2, 1943, the proposal made in the conference report was vigorously objected to, in addition to others, by Senator Wagner,[8] the author and champion of the National Labor Relations Act, Senator Tru-

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[7]"Mr. HARE. That is right. If he acquiesces in it for 3 months and makes no complaint, the idea is that he is satisfied. He has had plenty of time to consider it, plenty of time to deliberate. If somebody comes along and makes him dissatisfied after that, then he is stopped from expressing his dissatisfaction. The purpose of this amendment is to prevent racketeers interfering with the production in the war industries of this country. There is no attempt to amend the National Labor Relations Act. This is only an attempt to have orderly procedure and orderly conduct and, if people are satisfied, to prevent some racketeer from bringing in additional information, or new news, so to speak, and arranging in some way to discourage production in a plant or production in another plant, thus continuing to have turmoil throughout the country in our war-production plants" (p. 7024).

[8]"Mr. WAGNER. Mr. President, the proposed amendment concerning closed-shop agreements would practically repeal the Labor Relations Act. . . . We passed the Labor Relations Act because we wanted to do away with Company unions. No one objects to that, but what is proposed here will in effect authorize a company union" (p. 7104).

man,[9] a member of the Subcommittee and a conferee, Senator Ball[10] and Senator Reed.[11] They objected on the specific grounds that the provision would amend the Wagner Act and that it was not a proper provision to be inserted in an appropriation bill.[12] The need for stabiliza-

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[9]"Mr. Truman. Mr. President, I hope the Senate will reject this amendment. I think it is a vicious piece of legislation to attach to an appropriation bill. It would virtually repeal the Wagner Act and would not stabilize anything. I believe it would result in more trouble than good.

"My colleague from Minnesota has stated correctly the evidence which was collected by the special committee of which I am the chairman. We heard all sides of the controversy, and this amendment is merely the result of the desire on the part of the American Federation of Labor on the west coast to maintain an agreement which was entered into by a very small number of men employed in the plant of Mr. Kaiser. It is not a proper amendment to be put on an appropriation bill at this time. I sincerely hope that the Senate will reject it and send it back for further consideration by the conference committee. I also sincerely hope that the Senate will never accept it" (p. 7103).

[10]"Mr. Ball. . . . The American Federation of Labor sponsored this language, destroying a vital part of the Wagner Labor Relations Act, simply to stop the application of that law in this one case" (p. 7103).

[11]"Mr. Reed. The pending amendment would virtually repeal or nullify the Wagner Act, so far as the organizing of the men, or the right of men to vote for their collective-bargaining agencies is concerned" (p. 7104).

[12]In its Supplemental Brief (page 8) petitioner contends that such remarks "were at most expressions of a fear that the rider might be construed more broadly than was intended by its proponents. These fears must be treated as having been allayed by the reassurances given by the proponents. Certainly, we must look to the authors of a legislative act rather than to its opponents for our authoritative interpretation of its intent." The fallacy in this contention is that no reassurances were given. Further, while the statements of the Congressmen in charge of a bill (which, as we have seen, support our contention) may be entitled to particular consideration in determining legislative intent, the statement of other Congressmen, those opposing and those supporting the legislation, are entitled to considerable weight. We will not refer to the numerous decisions wherein the Supreme Court has relied upon such statements, but will merely point out that in the case of *United States v. Dickerson*, 310 U. S. 554, 558, 60 S. Ct. 1034, 1036, note 2 (1940), in holding that an amendment to an appropriation bill suspended a prior Act of Congress, the Supreme Court relied upon the statement of "Mr. Scott, one of the chief speakers against the amendment." Moreover, in the instant case, some of the opponents were Senator Wagner, the author of the Act being amended, Senator Truman, a member of the Subcommittee who participated in the hearings and a conferee, and Representative Smith (*supra*, page 14), who was more familiar with the National Labor Relations Act than any of the Appropriation Committee members, having at one time served as Chairman of the Special Committee of the House of Representatives, 76th Congress, 1st Session, appointed pursuant to H. Res. 258 to Investigate the National Labor Relations Board.

tion of labor relations was stressed by the Senators favoring the provision, and the conferees' draft was accordingly adopted (p. 7109).

We submit, in view of the above legislative history, that the National Labor Relations Board Appropriation Act, 1944, amended the Wagner Act, just as the rider in the Appropriation Act involved in the case of *United States v. Dickerson,* 310 U. S. 554, 60 S. Ct. 1034 (1940) suspended the enlistment allowance act under consideration therein. Petitioner asserts that the *Dickerson* case is not controlling "since the history of the legislation there involved left little room for doubt as to the Congressional intent." Yet in the *Dickerson* case, the provision of the appropriation bill involved which was held to have suspended the reenlistment allowance ("no part of any appropriation . . . shall be available for the payment") contained language significantly different from the prior appropriation bills which had suspended the re-enlistment allowance act (". . . the Act . . . is hereby *suspended* as to re-enlistments made during the fiscal year), thereby indicating a changed purpose. Moreover, in reaching its decision in that case the Supreme Court relied primarily on the statements of Congressmen, less positive than those quoted above herein, indicating that the effect of the amendment was to suspend the earlier act. In the case of the instant bill, the legislative history discloses positive and unequivocal statements in both Houses by those in charge of the bill, the committeemen and con-

ferees, the proponents of the rider and the opponents (including the author of the Wagner Act and also the most vigorous critic of that Act), by the National Labor Relations Board itself and witnesses testifying before the Senate Committee, that the rider would amend the National Labor Relations Act.

By the rider a statute of limitations was added to the Wagner Act applicable to the Kaiser and other pending cases.[13] The purpose was to stabilize collective bargaining relations and thereby prevent interruption and interference with production which results from the setting aside of collective bargaining contracts. It is true, as petitioner points out, that this statute of limitations was to be imposed for only one year, during the life of the appropriation bill. However, it was a war emergency measure, and it was believed that after a period of a year conditions would be such that there would be no further need for the provision, or if there were, an additional provision could be enacted at a later time (see quotations in petitioner's Supplemental Brief, page 9, note 9). The very fact that this was an emergency measure requiring only a limited period of relief, explains why the provision was enacted as part of an appropriation bill instead of in

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[13]Since the Appropriation Act rider did not repeal the Wagner Act but only imposed a statute of limitations to be applied in cases of a certain type, the presumption against repeal by implication, referred to by petitioner (Supp. Brief, p. 7), is not here applicable.

a separate bill specifically amending the Wagner Act.[14] In any event, the fact that the provision is effective only for one year does not justify petitioner's conclusion that therefore it could not have been intended as a substantive amendment to the Wagner Act. Indeed in the *Dickerson* case, the Court held that the basic act there involved was suspended from year to year by each new appropriation act.

We submit there can be no question that the rider to the Appropriation Act amended the Wagner Act by removing the Board's jurisdiction for a period of one year to institute or proceed in a complaint case involving a labor agreement which has been in effect more than three

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[14]Petitioner points out that in the cases in which it has been held that a statute has been amended by an Appropriation Act rider, "the statute affected was pecuniary in nature and therefore peculiarly subject to repeal or amendment by the withholding of funds" and no cases have involved rider amendments of "remedial social legislation creating substantial rights." While stating that this fact is significant, petitioner does not explain the significance and we fail to see it. Petitioner concedes (Supp. Memo., p. 4) that in the *Dickerson* case the Supreme Court held that "Congress can amend or repeal substantive legislation 'by an amendment to an appropriation bill, or otherwise'." The Court did not state that Congress could thus amend or repeal only statutes pecuniary in nature. As a matter of fact, the Wagner Act creates no private rights; it specifies certain action as an unfair labor practice, and gives to the National Labor Relations Board the "exclusive" power to "prevent any person from engaging in any unfair labor practice" (Sec. 10(a)). Thus the Wagner Act may be completely suspended by the withholding of funds from the Board.

The practice of amending substantive legislation by riders attached to appropriation bills has come into wide use during recent years. A few of the appropriation acts in which Congress has thus legislated are cited for illustrative purposes; Act of April 27, 1937, c. 140, 50 Stat. 96, 107 (limiting the number of midshipmen at the Naval Academy to a number less than required by existing law"); Act of July 1, 1937, c. 423, 50 Stat. 442, 464 (limiting active duty of Army reserve officers); Act of July 15, 1939, c. 281, Pub. 176, 76th Cong., 1st Sess., p. 6 (District of Columbia to insert legal advertisements less extensively than required by existing law); Act of June 14, 1935, c. 241, 49 Stat. 341, 356 (teaching of communism prohibited). In the last analysis, as petitioner concedes, the sole question herein is whether Congress intended to amend the Wagner Act, and the legislative history of the Appropriation Act establishes beyond question that Congress did so intend.

months before the complaint was filed. The instant case comes within the provision (Resp. Br. p. 6), and consequently the Court must refuse to sustain the Board's petition for enforcement of its order.

B. The Proviso Precludes the Enforcement of the Board's Order.

The petitioner contends that the Hare rider does not preclude the Board's use of its funds in the instant proceeding since the Comptroller General has ruled that the proviso does not apply to proceedings to enforce Board orders issued prior to July 1, 1943, and that this ruling is binding upon the Board. We submit that the Comptroller General's opinion is clearly erroneous and that it is not binding on this Court because in the first place, as pointed out above, the proviso amended the Wagner Act, and secondly, because of the equitable nature of this proceeding the Court may in the exercise of its discretion refuse to assist the Board in violating an Act of Congress.

The contention of the Board, which the Comptroller General accepted, is that the words "complaint case" in the proviso refer to a case "in the complaint stage" before the Board itself, "*i. e.*, in the stage preceding the issuance of a Board decision and order," and that any other construction would conflict with the legislative history of act (allegedly establishing that the purpose of the rider was to prevent the Board from issuing an order in the Kaiser and similar cases) and the provisions of the Wag-

ner Act (which allegedly draw a distinction between a "complaint," when the case is before the Board and a "proceeding" to enforce the Board's Order). This contention is without merit.

The Board in its letter to the Comptroller General (Pet. Supp. Br. App. A) pointed out that the Wagner Act in Sections 10(a), (b), and (c) refer to the issuance, serving, amending, answering, and sustaining or dismissing a "complaint," whereas Sections 10(e), (f) and (g) refer to "proceedings" before the courts. Petitioner's entire argument that Congress by the use of the words "complaint case" therefore referred to a case in the com plaint stage before the Board itself is destroyed, because in Section 10(b) of the Wagner Act, relating to proceedings before the issuance of a Board decision and order, reference is made to intervention in "said proceedings" and the rules of evidence applicable in "such proceeding," and under Section 10(e) a court may, when the Board's order is before it on a petition for enforcement, order additional evidence taken before the Board.

There is no mystery as to what Congress meant by the words "complaint case." It meant a proceeding involving a charge or complaint that an employer has committed an unfair labor practice in violation of the Wagner Act. It is an unfair labor practice case. Congress did not use such descriptive language because such cases are always referred to as "complaint cases" since they are initiated by the filing of charges and the issuance of a complaint based thereon.

Two types of proceedings arise under the Wagner Act. The first, provided for by Section 9(c), involves a determination of collective bargaining representatives. The

second is covered by Section 10, headed "prevention of unfair labor practices," involving a determination by the Board as to whether there has been a violation of the Act (unfair labor practices defined in Section 8) and (*covered by the same section*) the enforcement of Board orders in such proceedings by Court review. "Complaint cases are those which are instituted by the filing of charges that employers have engaged in unfair labor practices affecting commerce within the meaning of Sections 8 and 10 of the act." *Second Annual Report of the National Labor Relations Board* (1937), 18. "All cases instituted by the filing of a petition, pursuant to Section 9(c) of the Act requesting an investigation and certification of representatives of employees, are called representation cases." (*Ibid.* p. 25.) Proceedings under Section 9(c), under Board practice, include the letter "R" preceding the Board's docket number; proceedings under Section 10 include the letter "C" preceding the docket number. Thus the instant proceeding is designated by the Board as number XXI-C-2088 [Tr. 1]. Among the Board's staff, attorneys, and those familiar with proceedings under the Wagner Act, Section 10 cases are always referred to as "complaint cases," or even more commonly merely as "C" cases, and Section 9(c) cases are referred to as "representation" or "R" cases.

Thus Congress in the Hare rider used the words "complaint case" to distinguish the representation case, not to distinguish between pre-Board order and subsequent Board order stages in complaint cases. This is shown by the hearings before the House subcommittee. Representative Hare asked Mr. John M. Houston, a member of the National Labor Relations Board, "Will you tell us

the difference between a complaint case and a representation case?" Mr. Houston replied (Hearings, p. 319) "Yes. That is in the statement which I have submitted to you on page 316." In the statement referred to, the Board discussed Wagner Act proceedings under two headings, "Representation Cases" and "Unfair Labor Practice Cases," the discussion under the latter heading concluding (Headings, p. 316):

> "In summary, unfair labor practice cases go through a constant sifting, due process being observed at all times and the Board being required to issue orders in about 7 percent of the cases filed, and litigation in the courts being resorted to in a much smaller percentage of the cases."

Before the Senate subcommittee, Mr. Gerard O. Reilly, acting chairman of the Board, pointed out that (Hearings, p. 291) "We have two kinds of cases, complaint cases and representation cases." Just after the Appropriation Act was passed, Robert B. Watts, General Counsel of the Board, issued instructions to the Board's staff relative to the application of the Hare amendment to the Appropriation Act in which he stated (12 Lab. Rel. Rep. 805, 806) "1. The amendment applies only to complaint and not to representation cases."

There is no doubt therefore that Congress used the common designation "complaint cases" to distinguish representation cases. A complaint case involves various stages of proceeding, issuance of complaint, pre-hearing motions, etc., Board hearing, trial examiner's report, hearing before the Board itself, Board order, non-compliance, court petition for enforcement of the order. A complaint case is not concluded until some final and bind-

ing order is entered. An order of the National Labor Relations Board "is not self-enforcing. There are no fines or penalties for its violation. The order remains in this status unless and until enforced by a Circuit Court of Appeals" (Statement of National Labor Relations Board, House Subcommittee Hearings, p. 316). Obviously, therefore, when the Board in a "C" case seeks enforcement of its order based upon its complaint, the proceeding is but another stage in the "complaint case." Furthermore, even if you assume the validity of the Board's construction of "complaint cases," the Appropriation Act did not prohibit use of the funds "*in* a complaint case" or in the "complaint stage" as the Board argues, but "in *any way* in *connection* with a complaint case." So even under the Board's construction, the language prohibits use of funds in the Circuit Court of Appeals, since such funds would be used in a way in connection with a complaint case.

That this is the proper construction of the proviso is supported by the legislative history of the Appropriation Act. In the first place, in its one page written statement submitted to the Senate Subcommittee, the Board referred to the status of the *Kaiser* cases, "hearings in which have been completed, leaving only Board decision and court review" (Hearings, p. 288). It is inconceivable that Congress could have intended that the principal purpose of the rider—to prevent the setting aside of the Kaiser collective bargaining contracts—could have been avoided simply by the issuance by the Board of its order in the *Kaiser* cases prior to July 1, 1943. Obviously, Congress intended that collective bargaining contracts in effect should not be set aside so long as no com-

plaint was filed relative to them with the Board within three months from the time of their execution. In the instant case, the petitioner is seeking to have this Court set aside just such a contract.

The statements of Mr. Frey and the Congressmen relied upon by petitioner [Supp. Memo. App. A, pp. 5-6] do not establish that the purpose of the proviso "was to prevent the Board from deciding the *Kaiser* cases and from issuing complaints during the 1944 fiscal year in similar cases."[15] The purpose, as clearly appears from these statements and the many others heretofore quoted (See also Resp. Br. pp. 49-51), was to stabilize or "freeze" existing collective bargaining relations, or as stated by Congressman Tarver [Petr. Supp. Memo., App. A, p. 6] "to prevent during those 12 months the interruption of production in those two shipyards or in any other plants which are similarly situated." Production is not interferred with by the issuance of Board orders. It is the carrying out of such orders, either voluntarily or pur-

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[15]On June 17, 1943, the day after the House adopted the Hare rider to the Appropriation bill, the Board issued a statement opposing the Amendment on the ground, among others, that it would prohibit the Board from challenging contracts with company-dominated unions (12 Lab. Rel. Rep. 595, 596; Senate Subcommittee hearings, p. 288). However, after the Act was finally passed the Board took the position that the rider was meant to apply only to so-called raiding situations, such as in the Kaiser cases, and therefore did not prohibit the setting aside of company-dominated union contracts. (See statement of Robert B. Watts, General Counsel of the Board, 12 Lab. Rel. Rep. 805, 806.) This was the Board's position when it submitted its inquiry of July 20, 1943, to the Comptroller General. (Petr. Supp. Memo., App. A.) Subsequently, on October 21, 1943, the Comptroller General correctly ruled (see Resp. Brief, pp. 7-10), that the rider had a much broader scope and was applicable to all collective bargaining contracts, irrespective of whether or not the union was allegedly company-dominated. (13 Lab. Rel. Rep. 236.) The Board has now accepted this ruling, and therefore concedes that the rider applies to the instant case unless it is inapplicable to any complaint case where the Board's order was issued prior to July 1, 1943. We shall not, therefore, discuss the legislative history which shows that the rider was not limited to the so-called raiding situations and is applicable to cases of the character here involved.

suant to court decree, by the setting aside of existing contracts which creates the disturbing situation. Stability is not achieved if existing contracts which the Board ordered prior to July 1, 1943 to be set aside (which probably equal the number the Board would have ordered set aside in the 1944 fiscal year in the absence of the proviso) are upset after the passage of the Appropriation Act, and only those are left undisturbed concerning which no Board order had been issued prior to July 1, 1943. The intent of Congress to stabilize conditions can only be given effect if existing collective bargaining agreements are not disturbed whether or not the Board had issued an order prior to July 1, 1943. Enforcement of an order can only be compelled by the Board filing a petition for enforcement in the Circuit Court of Appeals, filing briefs, etc. Use of the Board funds (upon petitioner's theory that the rider only limited use of funds) for such a purpose was prohibited by the proviso where a collective bargaining agreement was in effect, though, as in the instant case, the Board's order was issued prior to July 1, 1943.

We submit that the proviso clearly applies to the enforcement stage of a complaint case. Petitioner asserts, however, that it is bound by the ruling of the Comptroller General to the contrary and contends that this ruling is "conclusive upon the executive branch of the Government." Petitioner cites no authority and apparently does not even contend that the ruling is binding on the judicial branch of the Government. Moreover, it should be noted that the ruling does not *require* the expenditure of funds in a case of this character; the Comptroller General merely ruled that the proviso does not preclude the Board from spending funds in seeking enforcement of orders issued prior to July 1, 1943.

If, as we submit is the fact, the proviso amended the Wagner Act, then the erroneous ruling of the Comptroller General can have no effect. This Court must give effect to the rider and refuse to enforce the Board's order in this complaint case which affects an existing collective bargaining contract. Petitioner does not contend otherwise. On the other hand, if, as petitioner does contend, the proviso did not amend the Wagner Act and merely prohibits the use of Board funds, the Court should nevertheless refuse to enforce the Board's order. The Comptroller General's ruling is, as we have shown, contrary to the intent of Congress. This Court should not permit the will of Congress to be flouted because of this erroneous ruling. Petitioner is in this Court seeking equitable relief in the form of an injunction. Citations for the proposition that proceedings of this character are of an equitable nature are not even necessary. This Court is clearly empowered to and should, in its discretion, refuse to grant the relief prayed for in view of the fact that Congress, in the interest of all-out war production, has (on petitioner's theory that the proviso does not amend the Wagner Act) prohibited the use of the appropriated funds in cases of this character.

In summary, we submit that the Appropriation Act rider applies to complaint cases in any stage, that the rider amended the Wagner Act so that at the present time the petition for enforcement cannot be granted under the Act as thus amended, and that even if the proviso be construed as not actually amending the Wagner Act, nevertheless the Court in its discretion should give effect to the will of Congress and refuse to enforce the Board's order.

C. Petitioner's Contentions That the Board's Use of Its Funds Is Not Subject to Judicial Review and Respondent May Not Challenge an Improper Use Are Without Merit.

Petitioner argues that even if the Comptroller General's opinion is erroneous (1) the Board's misuse of appropriated funds is a question exclusively within the province of the legislative department and therefore is not subject to judicial scrutiny, and (2) respondent will suffer no "direct injury" as a result of this illegal use by the Board of its funds and therefore has no standing in this Court to challenge this illegal use. It should be noted that the second of these two propositions establishes the unsoundness of the first. The second involves a concession that the question is not one outside of the province of the judiciary to inquire into where the litigant does show "direct injury." Moreover, both propositions are based upon the assumption that the rider did not amend the Wagner Act but merely limited the Board's use of its funds. Neither of these arguments, the Board concedes, has any validity if, as we contend, the rider amended the Wagner Act.

But even if we assume that the rider merely imposed a limitation upon the use of funds by the Board, the contentions of petitioner are unsound. In the first place it should be noted that we are not here seeking to enjoin the Board from making illegal expenditures, as was the situation in the cases relied upon by petitioner. The petitioner's "direct injury" cases, therefore, are not relevant herein. In this case the Board is the petitioner. It is asking this Court to enter an injunctive decree. In its Supplemental Brief petitioner contends that the Court

should grant the prayed for decree even though Congress has definitely declared, by a prohibition on use of funds, that, in the interest of all-out war production, existing collective bargaining relations are not to be disturbed. We are certain that this Court will not subscribe to such an unsound doctrine. Nothing in the doctrine of separation of powers requires such a result.

It is, of course, one of the primary duties of this Court to construe and give effect to Acts of Congress. Petitioner is asking this Court to sustain its interpretation of the National Labor Relations Act that the evidence justified the Board's order and to enter a decree enforcing the order. But Congress has declared that as an emergency measure such orders, even if otherwise proper, should not be enforced. We do not believe it possible that the Board can be sustained in its contention that its order is proper under the Wagner Act and must be enforced though a later Act of the same Congress declares that it should not be, even if this latter directive be construed merely as a limitation on the use by the Board of its funds for such a prohibited purpose. Petitioner cannot reasonably expect this Court to consider one Act of Congress and ignore another. Petitioner is praying for certain equitable relief in this Court. The relief should be denied where Congress, even though only by a prohibition of use of funds, has declared that Board orders should not be issued or enforced under the circumstances here present.

II.

The Statements of Respondent to Its Employees Were Constitutionally Privileged.

In our Brief herein (page 37) we contended that certain statements allegedly made by respondent's supervisory employees and relied upon by petitioner in its Opening Brief (pp. 15-17) did not amount to interference and were constitutionally privileged. In its Supplemental Memorandum, petitioner seeks to answer our contentions, but actually does not refer to the same statements which we were considering. In its Supplemental Memorandum (p. 19) petitioner considers the legal effect of certain coercive statements allegedly made. We do not deny that coercive statements are not protected by the Constitution. Relative to these alleged statements, however, it is our contention that there was no substantial evidence of such interference since over a period of the five years covered by the Record (the union having delayed five years in filing its charge with the Board) respondent did not in fact discriminate against any union member—not disputed—and the only evidence of such allegedly coercive, isolated statements came from completely discredited witnesses whose testimony was worthless (Resp. Br. pp. 13-21, 25-29, 38-39).

Conclusion.

We submit, for the reasons set forth in our Opening Brief, that the Board's order is contrary to law and is not supported by substantial evidence. Actually, however, the Court should refuse to even consider the merits of the Board's petition because of the Appropriation Act rider. Relative thereto we submit that the rider applies to complaint cases, such as the instant one, in the enforcement or any other stage whether or not the Board entered an order before or after July 1, 1943. Such being the case, the Board concedes the rider applies to the instant proceeding, but defends its petition and its continued request for an enforcement order on the ground that it is bound by a ruling of the Comptroller General and respondent cannot challenge in this Court the illegal expenditure by the Board of such public funds.

To this there are three answers: (1) The Comptroller General's erroneous ruling does not require the expenditure of the Board's funds in prosecuting this hearing. (2) The Hare rider actually amended the Wagner Act: this being so, the Board concedes the Court must refuse to enforce its order. (3) Even if the rider be construed as only a prohibition on the Board's use of its funds. the Court should not assist the Board in ignoring the will of Congress that labor relations be stabilized during this critical period. The instant case is just the type that Congress meant the rider to apply to. Respondent is engaged in the production of vital aircraft parts, and has

been awarded the Army and Navy "E" for production excellence. To prevent interference with such vital production, Congress has declared that existing collective bargaining relations must not be disturbed. If a decree of enforcement were granted herein, the existing union-employer relationship and union contract would be upset with all the undesirable results on war production that Congress sought to avoid. The Board's petition for enforcement of its order should, therefore, be denied.

Respectfully submitted,

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411 West Fifth Street, Los Angeles 13, California,
Attorneys for Respondent.

No. 10409

United States

Circuit Court of Appeals

For the Ninth Circuit.

THOR W. HENRICKSEN, formerly Acting Collector of Internal Revenue for the District of Washington, and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellants,

vs.

BAKER-BOYER NATIONAL BANK, a corporation, Executor of the Estate of George T. Welch, deceased,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington Southern Division

Rotary Colorprint, 590 Folsom St., San Francisco 60-6-30-43

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[1*]

*Page numbering appearing at foot of page of original certified Trancript of Record.

In the District Court of the United States for the Western District of Washington Southern Division.

No. 267

BAKER-BOYER NATIONAL BANK, a corporation, executor of the estate of GEORGE T. WELSH, deceased,

Plaintiff,

vs.

THOR W. HENRICKSEN, formerly acting Collector of Internal Revenue for the District of Washington; and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington;

Defendants.

COMPLAINT

Comes now the Plaintiff and for cause of action against the Defendant Alleges:

I.

That the Plaintiff is and at all times herein mentioned was a national banking corporation chartered and authorized to engage in business under the laws of the United States, with its principal place of business at Walla Walla, Washington; and authorized under the laws of the State of Washington to act as executor.

II.

That Defendant Thor W. Henricksen is a resident of the above entitled district and at all times

from the 11th day of July, 1936 to and including the 5th day of March, 1941, was acting Collector of Internal Revenue of the United States for the District of Washington; that on the 6th day of March, 1941, the Defendant Clark Squire was appointed Collector of Internal Revenue for said district and at all times since has been and is now such Collector, and that the said Clark Squire at all times since has been and is now a resident of the above entitled district, and maintains an office therein. [2]

III.

That the said George T. Welch, now deceased, did show, and the Plaintiff and its officer have shown true faith and allegiance to the Government of the United States, and that the decedent did not, and the Plaintiff and its officers have not, in any way aided, abetted or given encouragement or comfort to any person or persons or government in rebellion against the Government of the United States, nor did the decedent or nor has the Plaintiff or any of its officers aided, abetted or given encouragement or comfort to any sovereign government which is or has been at war with the United States.

IV.

That on April 15, 1937, the said George T. Welch died at Walla Walla, Washington; that he was survived by his widow, Carrie Welch, of Walla Walla, Washington, who was born on December 4, 1849; by his son, Fred Welch, who was born on June 28, 1880, and also by a grandson, George Allen, who was born on August 11, 1907.

V.

That the said George T. Welch and Carrie Welch were married and lived together as husband and wife for more than fifty years and until the day of his death; that all of the personal, real and mixed property, which belonged to him at the time of his death, was community property; that all of said community property belonging to said George T. Welch on April 15, 1937, was located entirely within the State of Washington.

VI.

That when George T. Welch died, he left what is designated under the laws of the State of Washington, a non-intervention will and Codicil, a copy of which are attached hereto and marked Exhibit "A" and made a part of this complaint by reference as completely as if set forth in full herein; that the said Will and Codicil were admitted to probate by the Superior Court of the State [3] of Washington, in and for *Walla* County, as the last will and testament of said George T. Welch on the 20th day of April, 1937; that on said 20th day of April, the said Baker-Boyer National Bank plaintiff herein was duly appointed executor of said estate and qualified as such and at all times since the said 20th day of April has been and is now the duly qualified and acting executor of said estate; that said court authorized said bank to execute said will and codicil.

VII.

That the widow Carrie Welch has a life estate under the provisions of said Will, with no power *in*

invade the corpus of said estate, and that the bequests to remaindermen, for religious, educational, scientific and charitable purposes in said Will are certain and fixed in amount; that the Superior Court of said Walla Walla County correctly interpreted the Will to the effect that the widow has no power to invade the corpus; that said estate was distributed pursuant to the order of said probate court and that said Carrie Welch has at no time received from her life estate more than the income; that her expenditures do not equal the income from her separate estate; and that the corpus remains intact in the hands of the plaintiff as trustee;

VIII.

That an estate tax return for said estate filed by the said executor with the said acting collector showed a gross valuation of $226,303.96 and a net valuation of $7,325.42 for estate tax purposes; that the original estate tax shown on said return and paid by the plaintiff was $146.50; that the said executor took as deductions in said return all bequests for religious, charitable, scientific and educational purposes, namely to-wit:

(a) a bequest of $12,500.00 to the Board of Conference Claimants Inc. of the Pacific Annual Conference of the Methodist [4] Episcopal Church, subject to the life estate of the widow and the grandson of said decedent, to be used by said Board for the maintenance and support of retired ministers of said denomination;

(b) a bequest of $159,035.74 residue, subject, to the life estate of the widow of said decedent, to

the Baker-Boyer National Bank as trustee for the relief of aged, indigent and poor, and the maintenance of the sick and maimed and for the construction and maintenance of a memorial hospital and home for them at Walla Walla, Washintgon, and for the support and education of worthy boys and girls of Walla Walla County.

IX.

That the office of the internal revenue agent in charge at Seattle, Washington, proposed to raise the gross valuation of the estate to $228,244.50 and also increase the net estate to $180,301.68 by the disallowance of the forementioned bequests thereby increasing the estate tax $21,417.55 over the $146.50 already paid; that the additional tax of $21,417.55 was paid with interest to the said acting collector in this manner to-wit:

Date of Payment	Tax Paid	Interest Paid
Nov. 1, 1939	$ 7,843.29	$ 609.17
Jan. 9, 1940	13,574.26	1,209.56
Total	$21,417.55	$ 1,818.73

that the aforesaid additional tax was paid upon the understanding that the payment thereof would not prejudice the right of the plaintiff to file a claim for refund of all payment of estate tax and interest made to the said action collector; that on the 30th day of April, 1940, the plaintiff filed with the defendant Thor W. Henricksen, as such acting collector, claim for refund of said amounts so paid, a copy of which claim, marked Exhibit "B" is attached hereto and made a part hereof by this ref-

erence for all purposes; that or about the 17th day of April, 1941, plaintiff received notice of rejection of said claim, a copy of which notice [5] marked Exhibit "C", is hereto attached, and by this reference made a part hereof for all purposes;

X.

That on or about the 15th day of March, 1941, the Commissioner of Internal Revenue assessed further additional tax against the plaintiff in the amount of $998.57, resulting from disallowance of part of credit for Inheritance Tax paid the State of Washington, of which assessment plaintiff was notified by letter received on or about the 19th day of March, 1941, after the assessment was made, a copy of which letter is hereto attached, marked Exhibit "D" and by this reference made a part hereof; that on the 25th day of April, 1941, the plaintiff paid said additional assessment to said defendant Clark Squire, as Collector of Internal Revenue, together with interest thereon in the amount of $159.77, making a total payment of $1158.34; that the plaintiff was deprived of the right of appeal to the Board of Tax Appeals by reason of the fact that the assessment was made without notice.

XI.

That on the 9th day of May, 1941, the plaintiff filed with the defendant Clark Squire, as such Collector, a supplemental claim for refund in the amount of $24,401.25 plus interest, a copy of which claim, marked Exhibit "E", is hereto attached and by this reference made a part hereof; that on the

11th day of July, 1941, plaintiff received notice of rejection of said claim, a copy of which notice is hereto attached, marked Exhibit "F" and by this reference is made a part hereof.

XII.

That all the actions of the defendants were performed by them as officers of the Government of the United States, under rules and instructions of the Commissioner of Internal Revenue; and that all moneys collected by them as aforesaid from the plaintiff was paid by them to the Treasury of the United States. [6]

Wherefore plaintiff prays for judgment as follows:

1. Against the defendant Thor W. Henricksen in the sum of $8,452.46 with interest thereon from the first day of November, 1939, at the rate of 6% per annum until paid; and in the further sum of $14,-783.82 with interest thereon from the 9th day of January, 1940, at the rate of 6% per annum until paid;

2. Against the defendant Clark Squire in the sum of $1158.34 with interest thereon from the 25th day of April, 1941, at the rate of 6% per annum until paid;

3. Against the defendants and each of them for plaintiff's costs and disbursements herein.

(Sgd) BURNS POE
Attorney for Plaintiff
Address: 1211 Puget Sound
Bank Building,
Tacoma, Wash. [7]

EXHIBIT A

Know All Men By These Presents, That I, George T. Welch, the husband of Carrie Welch, residing in the city and county of Walla Walla, State of Washington, and being desirous of making certain changes in my Last Will and Testament, heretofore and on the 16th day of September, 1930, made, published and declared, do hereby Make, Publish, and Declare this to be my Codicil thereto, that is to say:

I.

I do hereby revoke Paragraph "III" of my said Last Will and Testament.

II.

I do hereby revoke so much of Paragraph "VII" of my said Last Will and Testament as directs my Trustee, the Baker-Boyer National Bank, of Walla Walla, Washington, conditioned as therein provided, to convey, transfer, set over and deliver the principal of said trust fund, to-wit, the sum of thirty Thousand ($30,000.00) Dollars, with any then remaining unused net income, if any there be, to the Walla Walla Valley Hospital Association, commonly known as the Walla Walla Valley General Hospital, and I do hereby direct that the said Walla Walla Valley Hospital Association, or its successor in interest, shall in no event participate in or receive any portion of the principal of said trust fund, or any income therefrom, if any of there be, and in lieu thereof, but subject, however, to all the rights and benefits therein conferred upon my said wife,

Exhibit A—(Continued)

Carrie Welch, and my son, Fred B. Welch, or either of them, I do hereby give and bequeath the principal of said trust fund, with any remaining unused net income therefrom, if any there be, conditioned as above, unto my said Trustee, the Baker-Boyer National Bank, of Walla Walla, Washington, in trust, nevertheless, to be by it used and expended for the relief and support of the poor people, maintenance of the sick or maimed, irrespective of their nationality or religious beliefs or creeds, who may be deemed worthy, and with [8] especial reference to such of them as may be living in the States of Washington and Oregon, and particularly in the County of Walla Walla, Washington, or territory tributary thereto, as provided for in subdivision (b) of Paragraph "IX" of my said Last Will and Testament, and that said Paragraph "VII" in all other respects be and remain in full force and effect and as therein set forth and provided.

In Witness Whereof, I have hereunto set my hand and seal this 19th day of September, 1931.

[Seal] GEORGE T. WELCH

The foregoing typewritten instrument was, at the date hereof, signed, sealed and published by the said George T. Welch, and by him declared to be a Codicil to his aforesaid Last Will and Testament of date September 16, 1930, to which this instrument is attached, in the presence of us, who, at his request and in his presence and in the presence of

Exhibit A—(Continued)

each other, have subscribed our names as witnesses thereto this 19th day of September, 1931.

GRACE McGUIRE,
Residing at Walla Walla,
Washington.

MARVIN EVANS,
Residing at Walla Walla,
Washington. [9]

Know All Men By These Presents, That I, George T. Welch, the husband of Carrie Welch, residing in the city and county of Walla Walla, State of Washington, do hereby Make, Publish and Declare the following as and for my Last Will And Testament, hereby revoking any and all former Wills by me made:

I.

I do hereby declare that all the estate of which I am possessed or claim any interest therein belongs to the community consisting of my said wife, Carrie Welch, and myself.

II.

I do hereby direct that all my just debts be first paid and discharged, including the expenses of my last sickness and burial, as soon as there are funds available therefor.

III.

I do hereby give and bequeath unto the Walla Walla Valley Hospital Association, commonly

Exhibit A—(Continued)

known as the Walla Walla Valley General Hospital, located at Walla Walla, Washington, the sum of Thirty Thousand ($30,000.00) Dollars in cash, or the equivalent in value thereof in securities found in my estate, to be by it used as in its judgment is proper for the furtherance of its objects as a charitable organization.

IV.

I do hereby give and bequeath unto my esteemed friend, Tena Zuest, and who is now living in my home in the city of Walla Walla, Washington, the sum of Five Hundred ($500.00) Dollars, and unto my esteemed friend, Mrs. Clara Pitt, now residing at Oakland, California, the sum of Five Hundred ($500.00) Dollars.

V.

I do hereby give, devise and bequeath unto my said wife, Carrie Welch, for and during her life time, should she survive me, all the rest, residue and remainder of my estate, both real and personal, including the rents, issues and profits therefrom, [10] and of whatsoever the same may consist and wheresoever situated, with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee, hereinafter named, in trust, nevertheless, for the uses and purposes hereinafter mentioned, and more particularly set forth, save and

Exhibit A—(Continued)

except my community undivided one-half interest in certain lands hereinafter described, which I hereinafter give and devise unto my son, Fred B. Welch, freed from any trust provision of my Will; but should I survive my said wife, Carrie Welch, then upon my death I do hereby give, devise and bequeath all the then rest, residue and remainder of my estate, both real and personal, including the rents, issues and profits therefrom and of whatsoever the same may consist and wheresoever situated, unto my said Trustee hereinafter named, in trust nevertheless, for the uses and purposes hereinafter set forth, save and except my community undivided one-half interest in certain lands and premises which I hereinafter give and devise unto my said son, Fred B. Welch, freed from any trust provision of my Will as aforesaid.

VI.

Subject to the life estate hereinbefore given, devised and bequeath unto my said wife, Carrie Welch, should she survive me, as aforesaid, I do hereby give and devise my community undivided one-half interest in and to the following described lands and premises situated, lying and being in the county of Walla Walla, State of Washington, to-wit:

Beginning at a point on the East line of Section 33, in Township 7 North, of Range 34 East of the Willamette Meridian, which is 10 chains North of the quarter corner on the East side of said Sec-

Exhibit A—(Continued)

tion 33; thence North on the East line of said Section 33 and the East line of Section 28, said Township and Range, to a point in the East line of said Section 28, which is 50 feet South of the center line of the main tract of the Walla Walla and Columbia River Railroad (Oregon Railroad and Navigation Company) measured on a line drawn at right angles to said center line; thence westerly on a line drawn parallel to and distant 50 feet Southerly from said center [11] line of said railroad, to a point in the North and South center line of said Section 28 thence South and on said center line of said Section 28 and the center line of Section 33 aforesaid, to a point in said center line of Section 33, which is 10 chains North of the center point of said Section 33; thence East 39.32 chains to the point of beginning.

Also

Beginning at a point in the North line of the Louis Dauncy Donation Claim, which is 60 feet West of the point of intersection of said North line with the North and South center line of Section 28, Tp. 7 N. R. 34, E. W. M.; thence West 4.50 chains; thence South 14.95 chains; thence North 72° 20′ West 8.34 chains thence South 7.42 chains, to the Walla Walla River; thence following the meanderings of said River in a general Easterly direction, and along its north bank as follows:— N. 56° 29′ E. 2.07 chains; N. 83° 24′ E. 2.49 chains; thence S. 36° 54′ E. 1.50 chains; thence S. 10° 06′ E. 4.32 chains; thence S. 76° 12′ E. 1.19 chains; thence N.

Exhibit A—(Continued)

20° 23′ E. 7.40 chains; thence N. 75° 13′ E. to a point on the North bank of said River which is 60 feet West of said North and South center line of Section 26, measured on a line at right angles thereto; thence North 18.35 chains to the point of beginning.

Together with all easements, rights of way, water and water rights thereunto belonging or appurtenant to the lands and premises above described.

Said Louis Dauncy Donation Claim begin Claim No. 38, according to the Official Plat thereof in the office of the Surveyor General of the United States and being parts of Sections 28, 29, 32, and 33 in Township seven (7) North, of Range thirty-four (34) East of the Willamette Meridian.

Excepting, however, therefrom the tract of land 400 feet east and west by 200 feet north and south heretofore conveyed to E. C. Burlingame by deed of record at page 94 of Volume 155 of Deeds in the office of the County Auditor of Walla Walla County, Washington, and, by reference, the description therein contained being made a part hereof, unto my said son, Fred B. Welch, as his absolute estate; but should I survive my said wife, Carrie Welch, then upon my death I do hereby give, devise and bequeath the same unto my said son, Fred B. Welch, as his absolute estate.

VII.

Subject to the life estate hereinbefore given, devised and bequeath unto my said wife, Carrie

Exhibit A—(Continued)

Welch, in my estate, should she survive me as aforesaid, do hereby give and bequeath to my said Trustee, the Baker-Boyer National Bank, of Walla Walla, Washington, the sum of Thirty Thousand ($30,000.00) Dollars in cash, or the equivalent in value thereof in securities found in my estate, in trust, neveretheless, during the time and for the purpose hereinafter set forth.

To hold, manage, invest and reinvest the principal and surplus [12] income, if any, in securities prescribed by the Statutes of the State of Washington now or hereafter in force as legal investments for trust funds, and to collect and receive interest and income accruing thereon, and after deducting from such income all proper charges and expenses incident to the management and execution of this trust, and including in addition thereto a compensation for its services as Trustee, which compensation shall be computed on the following basis; one half of one per cent per annum of the value of said trust for all services incidental to the collection and distribution of income and the collection and reinvestment of all principal sums, to pay over semi-annually, or oftener, in its discretion, the net income arising therefrom to my said son, Fred B. Welch, should he surivive me, for and during his life time so long as he can personally use and enjoy the same, conditioned as hereinafter provided, with the remainder over upon his death, at which time I direct my said trustee to convey, transfer, set over and deliver the principal os said trust fund, with any then remain-

Exhibit A—(Continued)

ing unused net income, if any there be after his death and burial, to the Walla Walla Valley Hospital Association, commonly known as the Walla Walla General Hospital located at Walla Walla, Washington, to be by it used as in its judgment is proper, for the furtherance of its objects as a charitable organization; but should I survive him, my said son, and subject to the life estate of my said wife, Carrie Welch, should she survive me, as aforesaid, I do hereby give and bequeath the same durect and independent of said trust to the said Walla Walla Valley Hospital Association, to be by it used as in its judgment is proper, for the furtherance of its objects as a charitable organization. The provision hereinbefore made for my said son, Fred B. Welch, so long as he may live, should he survive me, is upon the express condition, however, that he be and he is hereby restrained from and is and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his beneficial and legal right, title, interest, claim and estate in [13] and to the income of this trust during his life time, nor shall his right, title, interest and estate be subject to the rights or claims of creditors, nor subject nor liable to any process of law or court and all of the net income of this trust shall be transferable, payable and deliverable only, solely, exclusively and personally to him at the time or times he is entitled to take the same under the terms of this trust, and his personal receipt shall be a condition precedent

Exhibit A—(Continued)

to the payment or delivery of the same by said Trustee to him, and if by reason of bankruptcy or insolvency or any other means whatsoever said net income or any part thereof could no longer be personally enjoyed by him, my said son, but that the same or any part thereof would become vested in or payable to some other person, corporate body, or otherwise than my said son, then such portions of said net income as would so vest in him shall immediately and absolutely cease and determine as the case may be, and the same remain vested and in the possession of my said Trustee, in trust, and accumulate in the augmentation of the principal of my estate; and in case after the cessation of such net income or any portion thereof for either of the above causes as to my said son, it shall be lawful, nevertheless, for my said Trustee, in its discretion, to pay or apply for the use of my said son so much and such part of said net income as my said trustee may see fit, to which he would have been entitled under the foregoing trust provision in case the forfeiture hereinbefore provided for had not happened. The foregoing limitations are made in order that my said son may be provided for so long as he may live and the legitimate user of such net income will suffice for this purpose, and for the further reason that such net income may at all times be kept free from liability from any debts or other obligations then or thereafter contracted or suffered to exist by him.

Exhibit A—(Continued)

VIII.

Subject to the life estate hereinbefore given, devised and [14] bequeathed unto my said wife, Carrie Welch, in my estate, should she survive me as aforesaid, I do hereby give and bequeath to the Baker-Boyer National Bank, of Walla Walla, Washington, the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars, in cash, or the equivalent in value thereof in securities found in my estate, in trust, nevertheless, during the time and for the purposes hereinafter set forth:

To hold, manage, invest and reinvest the same, including the surplus income, if any, in securities prescribed by the Statutes of the State of Washington now or hereafter in force as legal investments for trust funds, and to collect and receive interest and income accruing thereon, and after deducting from such income all proper charges and expenses incident to the management and execution of this trust, and including in addition thereto a compensation for its services as Trustee, which compensation shall be computed on the following basis: one-half of one per cent per annum of the principal of said trust for all services incidental to the collection and distribution of income and the collection and reinvestment of all principal sums, and to pay over semi-annually, or oftener, in its discretion, the net income, from time to time, arising therefrom to my grandson, George B. Allen, should he survive me, for and during his life time, so long as he can personally use and enjoy the same, conditioned as here-

Exhibit A—(Continued)

inafter provided, with the remainder over upon his death, at which time I direct my said Trustee to convey, transfer, pay over and deliver the principal of said trust fund, with any then remaining unused net income, if any there by after his death and burial, to the Board of Conference Claimants, Inc. of the Pacific Northwest Annual Conference, Methodist Episcopal Church, now having its offices in Seattle, Washington, to be by it used for the maintenance and support of the retired ministers of said denomination; but should I survive him, my said grandson, and subject to the life estate of my said wife, Carrie Welch, should she [15] survive me as aforesaid, I do hereby give and bequeath the same direct and independent of said trust to the said Board of Conference Claimants, Inc. of the Pacific Northwest Annual Conference, Methodist Episcopal Church, now having its offices in Seattle, Washington, to be by it used for the maintenance and support of the retired ministers of said denomination. The provision hereinbefore made for my said granson, George B. Allen, so long as he may live, should he survive me, is upon the express condition, however, that he be and he is hereby restrained from and is and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his beneficial and legal right, title, interest, claim and estate in and to the income of this trust during his life time, nor shall his right, title, interest and estate be subject

Exhibit A—(Continued)

to the rights or claims of creditors, nor subject nor liable to any process of law or court, and all of the net income of this trust shall be transferable, payable and deliverable only, solely, exclusively and personally to him at the time or times he is entitled to take the same under the terms of this trust, and his personal receipt shall be a condition precedent to the payment or delivery of the same by said Trustee to him, and if by reason of bankruptcy or insolvency or any other means whatsoever said net income or any part thereof could no longer be personally enjoyed by him, my said grandson, but that the same or any part thereof would become vested in or payble to some other person, corporate body, or otherwise than my said grandson, then such portions of said net income as would so vest in him shall immediately and absolutely cease and determine as the case may be, and the same remain vested and in the posession of my said Trustee, in trust, and accumulate in the augmentation of the principal of my estate; and in case after the cessation of such net income or any portion thereof for either of the above causes as to my said grandson, it shall be lawful, nevertheless, for my said Trustee, in its discretion, to pay [16] or apply for the use of my said grandson so much and such part of said net income as my said Trustee may see fit, to which he would have been entitled under the foregoing trust provision in case the forfeiture hereinbefore provided for had not happened. The foregoing limitations are made in order that my said grandson may be pro-

Exhibit A—(Continued)

vided for so long as he may live and the legitimate user of such net income will suffice for this purpose, and for the further reason that such net income may at all times be kept free from liability from any debts or other obligations then or thereafter contracted or suffered to exist by him.

IX.

Subject to each and every of the foregoing provisions of this my Last Will and Tesament, including the life estate in my said estate hereinbefore given, devised and bequeathed unto my said wife, Carrie Welch, should she survive me, I do hereby give, devise and bequeath all the rest, residue and remainder of my property and not hereinbefore given, devised and bequeathed, and whether real, personal or mixed, and of whatsoever it may consist, and of whatsoever character and kind, and wheresoever situated, including any prior legacies that may lapse, fail or be ineffective for any reason whatsoever, unto my said Trustee, the Baker-Boyer National Bank, of Walla Walla, Washington, To Have and To Hold The same, together with all the privileges and appurtenances thereunto belonging, and all income and profits arising therefrom, to my said Trustee, perpetually, intrust, nevertheless, for the uses and purposes hereinafter set forth:

(a) My said Trustee is hereby directed to take out of my trust estate, from time to time, as the demand therefor seems adviseable to my said Trustee, such sums of money, either out of the principal or

Exhibit A—(Continued)

out of the net income accrued or accruing therefrom for the creation of a "Revolving Fund" to be by it used either as a loan or a gift, as in its judgment is proper, for the support or education, or both, [17] of worthy boys and girls, (irrespective of age), nationality or religious beliefs or creeds, said boys and girls to be selected by my said Trustee or by a committee of two, consisting of the President of Whitman College, located at Walla, Walla, Washington, and the Superintendent of School District No. 1, in the city of Walla Walla, Washington, said committee selection of any such boy or girl to be, however, subject to the approval of my said Trustee, My said Trustee shall be and it is hereby given full power and authority over said trust fund and the handling and disposition thereof, or of the net income therefrom, and to do any and all acts and things of any kind whatsoever requisite and necessary to carry out the purposes of said "Revolving Fund"; it being understood that my said Trustee shall not be liable for any losses that may occur in the administration and disposition of said "Revolving Fund", but it is expected to use diligence in the carrying out of its purposes.

(b) Out of my trust estate my said Trustee is hereby authorized and directed to use and expend so much of the net income therefrom as in its discretion it may deem necessary, depending upon the needs and demands therefor, for the relief and support of the aged, indigent and poor people, maintenance of the sick or maimed, irrespective of their

Exhibit A—(Continued)

nationality or religious beliefs or creeds, who may be deemed worthy, and with especial reference to such of them as may be living in the States of Washington and Oregon, and particularly in the County of Walla Walla, Washington, or territory tributary thereto, such persons to receive such benefits to be first selected by my said Trustee, or a committee of three, to be appointed from time to time by my said Trustee, said committee selection of any such person to be, however, subject to the approval of my said Trustee My said Trustee shall make all the arrangements, by it deemed necessary, for the support, care and relief of all such persons so selected, and the place of places where such aged, indigent or poor people [18] are from time to time to be kept, or where such sick or maimed may receive treatments, but preferably in some place or places of its selection in the city of county of Walla Walla, Washington, where I have lived the major portion of my life and where I am most concerned and where most of my estate has been created.

(c) My said Trustee, however, is advised, and for this purpose it is hereby authorized and fully empowered, if in its judgment the condition of my estate will warrant it, and local conditions are in need of same, to expend out of the prinicpal and/or cut out of the net income of my trust estate amounts sufficient to erect or assist in the erection of a building in the city of Walla Walla, or in the vicinity thereof, as a memorial to my said wife, Carrie Welch, and myself, said building to be used as a

Exhibit A—(Continued)

home for aged people. Provided that in the said home building such aged people are entitled to admission therein irrespective of their nationality or religious beliefs or creeds, the cost and kind of said building and its upkeep to be left to the discretion of my said Trustee, other than the the exterior thereof shall not be of wood construction.

(d) If there is remaining any unused income from my estate for any of the purposes aforesaid, my said Trustee is authorized and fully empowered to use the same for such other charitable uses and purposes, as it, in its discretion, may see fit to employe the same.

(e) If any of the institutions hereinbefore mentioned to participate in the benefits of my trust estate cease to exist or function, or in the event of the merger, re-organization, consolidation or transfer of the same, which will affect a change of identity, then any successor or successors thereto shall be elegible at the discretion of my said Trustee to participate in my trust estate to the same extent as hereinbefore provided.

And to more effecutally administer and carry into effect the uses and purposes hereinbefore set forth; my said Trustee shall be and it is hereby authorized and fully empowered: [19]

(a) To hold, maintain and indefinitely retain, so long as it believes it is advisable so to do, in which it shall be the sole judge thereof, the identical securities, properties, or investments received by it from my estate, whether it be at my

Exhibit A—(Continued)

death or at the death of my said wife, Carrie Welch, should she survive me.

(b) To grant, bargain, sell, exchange, convert and lease, and when it shall be deemed necessary and in the discretion of my said Trustee for the benefit of the trust so to do, to pledge, assign, partition, subdivide and distribute, either or both, the income and principal of my said trust estate, and for this purpose to execute any and all instruments, whether under seal or otherwise whatsoever requisite and necessary therefor.

(c) To receive and collect all income and principal, invest and re-invest the principal and surplus income, if any, in securities prescribed by the Statutes of the State of Washington, now or hereafter in force as legal investments for trust funds. In the management of this trust estate my said Trustee is requested to look primarily to the safety of principal rather than high yield in the investment of the funds of this trust.

(d) To pay all taxes and assessments of every character, including any state or federal estate taxes, fees and expenses necessarily incurred in the administration of this trust, including court costs in the event of any litigation pertaining to this trust, and any attorney's fees or other fees or costs incident thereto, together with a reasonable fee for said Trustee, which it is agreed shall be as follows: For all usual and ordinary duties as Trustee hereunder an annual fee equal to one-half of one per cent on the principal amount of this trust.

Exhibit A—(Continued)

(e) My said Trustee shall not be liable for the keeping of funds invested in full at all times, but it shall use diligence so to do, or for losses which may occur in the administration of this trust, but it is expected to exercise due care and caution in its adminis- [20] tration of said trust, but it is expected to exercise due care and caution in its administration of said trust.

(f) In the event an emergency arises that requires my Trustee to borrow funds temporarily, my said Trustee may advance its own funds to the trust estate, each and all of such loans or advances are to bear interest at prevailing rates and shall first be repaid out of both income and principal of the trust estate.

(g) My said Trustee is vested with sole discretion and power to determine what shall constitute principal of the trust estate and what shall constitute gross income therefrom or net income available under the terms of this trust.

(h) and in general way my said Trustee is hereby give full power and authority to do any and all acts or things of any kind whatsoever requisite and necessary to carry out the terms of this trust without reference to or the order of any court or courts whatsoever, and to the same extent as I could do if personally present.

X.

Should either my said son, Fred B. Welch, or my said grandson, George B. Allen, or both of

Exhibit A—(Continued)

them, object to the probate of this Will, or in any way directly or indirectly contest or aid in the contest of the same, or of any of its provisions made for their use and benefit as herein provided, then in such event they, or either of them, so contesting, shall be absolutely barred and cut off from receiving any share or portion of my estate, and the share or portion of my estate which would have been paid or distributed to such one so contesting shall be paid and distributed to the aforesaid the Baker-Boyer National Bank in trust, nevertheless to be by it adminstered, and/or in its discretion, in which it shall be the sole judge thereof, for the use and benefit of any of the residuary beneficiaries of my estate. [21]

XI.

In the event of a merger, reorganization or consolidation of my said trustee which will affect a change of identity of the corporate name of said trustee, then any successor to said trustee shall continue hereunder with full authority and with like powers as herein granted to said Baker-Boyer National Bank, of Walla Walla, Washington, as original trustee herein.

XII.

In order that my said wife, Carrie Welch, may be relieved of the responsibility in the administration upon my estate, and the responsibilities incident thereto, I do hereby Nominate and Appoint my said Trustee, the Baker-Boyer Nation Bank, of Walla Walla, Washington, the Executor of this

Exhibit A—(Continued)

my Last Will and Testament, to serve as such without bonds or other security being required of it in the execution of its said trust, and that in the management of my said estate it act according to its own judgment, but in so doing I request that it keep my said wife, from time to time, advised as to the condition of my estate; that Letters Testamentary or of administration shall not be required of it except to admit this Will to probate and to file a true inventory of all the property of my estate and the giving notice to creditors in the manner require by law; that it, while serving as such executor, shall be and it is hereby fully authorized and empowered to lease or sell all or any part of my estate, real and personal, upon such terms and at such price or prices, as in its judgment is proper, without the necessity of applying to any court or any order of any court so to do, and without the necessity of reporting any such sale to any court or of obtaining an order of confirmation thereof from any court, and for such purpose to execute any and all instruments whatsoever requisite and necessary therefor, to the same extent as I could do if living, and that in so far as by law in any case can be done it shall be relieved from the supervision and control [22] of all courts, answering only to the tribunal of its own conscience for fidelity in its said office.

Exhibit A—(Continued)

In Witness Whereof, I have hereunto set my hand and seal this 16th day of September, 1930.

[Seal] GEORGE T. WELCH

The foregoing typewritten instrument written on the thirteen preceding pages attached hereto and made a part hereof, was, at the date hereof, signed, sealed and published by the said George T. Welch, the Testator herein, and by him declared to be his Last Will and Testament, in the presence of us, who, in his presence, and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses hereto this 16th day of September, 1930.

GRACE McGUIRE,
Residing at Walla Walla,
Washington.

MARVIN EVANS,
Residing at Walla Walla,
Washington.

EXHIBIT B

Claim
To be Filed With the Collector Where
Assessment Was Made or Tax Paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Washington,
County of Walla Walla—ss.

Type
or
Print

Name of taxpayer or purchaser of stamps Baker-Boyer National Bank of Walla Walla, as executor of the estate of George T. Welch, deceased

Business address Baker Bldg. (Street) Walla Walla (City) Washington (State)

Residence Baker Bldg. Walla Walla Washington

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed District of Washington

2. Period (if for income tax, make separate form for each taxable year) from....., 19...., to....., 19....

3. Character of assessment or tax Estate Tax

4. Amount of assessment, $21,564,05; dates of payment 3/18/38; 11/1/39; 1/9/40

5. Date stamps were purchased from the Government.....

6. Amount to be refunded ..$23,382.78, or such other sum as is legally refundable

7. Amount to be abated (not applicable to income or estate taxes)..... $.....

8. The time within which this claim may be legally filed expries, under Section 810 of the Revenue Act of 1932, on March 18, 1941, Nov. 2, 1942; Jan. 9, 1943

The deponent verily believes that this claim should be allowed for the following reasons:

(See Attached Sheets)

(Attach letter-size sheets if space is not sufficient)

Signed BAKER-BOYER NATIONAL BANK of Walla Walla, as executor of estate of Geo. T. Welch, deceased

bt N. H. DAVIS
as vice-president of Baker-Boyer National Bank

Sworn to and subscribed before me this 29 day of April 1940

C. R. POSTIN
Notary Public

(Signature of officer administering oath) (Title)

[24]

In The Superior Court of the State of Washington
In and for the County of Walla Walla

No. 26994

In the Matter of the Estate

of

GEORGE T. WELCH, deceased, Baker-Boyer National Bank, a corporation, as Executor and Trustee,

Petitioner

vs.

State of Washington, Inheritance tax and Escheat Division

Respondent

O R D E R

This Matter coming on regularly to be heard before the undersigned and it appearing to the court that a controversy has arisen between the executor and trustee on the one hand and the Supervisor of the Inheritance and Escheat Division on the other hand, and the court having heard the arguments of counsel, and it further appearing to the court that the valuation of the total community estate should be the sum of $454,988.99 notwithstanding the appraisement of the appraisers on file herein, and that the State of Washington is entitled to the payment of $3.16, with interest at the rate of eight per cent per annum from the date of the death of decedent until paid; and the court having concluded that the State of Washington is

not entitled to assess inheritance taxes against the estate due to the fact that the charitable trusts created by the will of decedent above named were not limited to use in the State of Washington, and the Court being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed: that the State of Washington is entitled to receive as additional inheritance tax the sum of $3.16 with interest thereon from the 15th day of April, 1937, until paid, and the executor and trustee herein having raised the question that he is entitled to instructions from the court directing as to the [25] fund or interest chargeable under the laws of the State of Washington and the terms of said will of the decedent and the decree of distribution heretofore entered herein, the court hereby orders, adjudges and decrees and contrues the said will and decree of distribution:

(1) That under the words, terms and provisions of the said will, admitted to probate herein and made a part hereof by reference the widow of the decedent, Carrie Welch, is entitled to receive from the trustee appointed by said will the net income from the dededent's half of the community property distributed to the trustee by the decree of distribution on file herein; that under the words, terms and provisions of said will, the said widow Carrie Welch received only a life estate with a vested remainder over to the remaindermen therein mentioned, and subject to the trusts therein created.

(2) That under the words, terms and provisions of said will the said widow Carrie Welch has no power to invade the corpus of said estate, but, during her lifetime, is entitled only to the net income above mentioned.

(3) That the remaindermen mentioned in said will inherited vested remainders, subject to the trust therein created.

(4) That the trustee shall not permit the corpus of the said estate to be invaded by the said Carrie Welch, but shall at all times manage and control said property in accordance with the terms of said trust with the powers therein given to it as trustees.

(5) That the trustee herein be and is hereby ordered and directed to pay the inheritance tax provided for out of corpus of the estate.

Done in open Court this 29th day of March, 1940.

TIMOTHY A. PAUL
Judge

Presented by:
BURNS POE & MARVIN EVANS
Attorney for Petitioner

O.K. as to form:
JOHN M. BOYLE, JR.
Attorney for Supervisor

[26]

(To Be Attached to the Welch Refund Claim)

The Internal Revenue Agent in Charge, Seattle, Washington, erroneously proposed a deficiency tax of $21,417.55 to be assessed against the estate of George T. Welch (1) by increasing the value of the gross estate (community one-half) from $226,303.98 to $228,244.50 and (2) by disallowing as deductions the charitable and educational bequests taken in the estate return filed by the executor, to-wit:

(a) $12,500.00 to the Board of Conference Claimant Inc. of the Pacific Northwest Annual Conference of the Methodist Episcopal Church, subject to the life estate of the widow and the grandson of said decedent, and

(b) $159,035.74 residue subject to life estate to the Baker-Boyer National Bank as trustee for the relief of the aged and poor and for the construction and maintenance of a memorial hospital for them.

The taxpayer did not, and now does not, protest the increase in valuation of the estate placed thereon by the Bureau of Internal Revenue, but does protest the erroneous disallowance of the said deductions, because said deductions are allowable under the provision of section 303 (a) (3), Revenue Act of 1926, as amended, and the amounts thereof were presently ascertainable at time of death.

Under the decedent's will the surviving spouse had the right to expend the income of the estate, but had not the right to sell, alienate, or invade the

corpus. She was given "A life estate."

Besides the proposed $21,417.55 additional federal tax, the estate of George T. Welch was confronted with the onerous burden of a proposed additional state of Washington inheritance tax in the sum of $34,854.11, also erroneous, with interest from date of death—fifteen more months than the federal law provided—and then, too, the state interest rate was thirty-three and one-third per cent (33 1/3%) higher than that of the federal government on any additional tax.

Since the proposed assessment of the State Inheritance Tax was the larger assessment of the two, and had the more burdensome interest provision, prudent management of the estate required a prior closing of the State Inheritance Tax; but the state law (Rem. Rev. Stat. 11202-11) would not permit the closing of the State Inheritance Tax matter without an agreement with the Bureau. In order, therefore, to settle the State Inheritance Tax the executor had to sign such an agreement consenting to the assessment of the proposed erroneous tax. The agent's office and collector's office were fully advised, however, that this refund claim would be filed.

In connection with the determination of the State Inheritance Tax, certain rights of the legatees under the will had to be determined. The will had been admitted to probate before the Hon. Timothy Paul, Judge of the Superior Court of the State of Washington in and for the County of Walla Walla, who had conducted all hearings in con-

nection with the same and was familiar with the property rights of the beneficiaries. At a hearing regularly held these questions were presented to him, in connection with the determination of the Inheritance Tax, and he decided: [27]

> "That under the words, terms and provisions of said will the said widow, Carrie Welch, has no power to invade the corpus of said estate, but, during her lifetime, is entitled only to the net income above mentioned."

The Board of Tax Appeals and the Federal Courts are bound by decisions of the State Courts in regard to property rights and the effect of conveyances executed within the state until reversed or overruled, and establishes the law of that jurisdiction and the right of the beneficiaries to that property.

Tyler V. U. S. 281 U. S. 497; 8 A. F. T. R. 10912; Preuler v. Helvering 291 U. S. 35; 13 A. F. T. R. 834; Blair v. Comm. 300 U. S. 5:18 A. F. T. R. 1132

In addition to the foregoing Supreme Court decisions there are numberous district and circuit court decisions to the same effect.

In sharpe v. Commissioner, the Third Circuit Court of Appeals held on Nov. 2, 1939 that:

> "That question presented to us has therefore been specifically decided by the Orphans' Court and that decision unappleaed is binding."

Again the court said:

> "The judicial construction of the will by the

> State Court detemines not only legally but practically the extent and character of the interests taken by the legatees. (Uterhar v. U. S. 240 U. S. 598, 603.) This court is bound by the decision of the State Court. (Preuler v. Helvering 291 U. S. 5.) Blair v. Comm. 300 U. S. 5 We must first therefore discover how the Orphans' Court of Philadelphia County, which had jurisdiction construed Mr. Gilbert's will."

In the Sharpe case, we find that the testator, Mr. Gilbert, died on June 28, 1877; his wife on March 23, 1880, and the last child on April 2, 1931. The trust under the will was kept alive, and the construction of the will as to property rights was made fifty-five years after the testators death. The Bureau maintained before the Board and the Circuit Court that the State Court decision should be followed.

The above cited Freuler case involved the construction placed on the will by the State Court after the tax case came before the Board of Tax Appeals. The U. S. Supreme Court sustained the Board's position that the State Court's decision in the construction of the will should be followed.

The bulk of the Welch will is devoted to detailed provision for the creation and operation of charities. It was not contemplated by the testator that his widow, Carrie Welch, should ever touch the corpus because the trust funds set up for his son and grandson were to be composed of

> "Cash, or the equivalent in value thereof in securities found in my estate."

There was sufficient cash and securities provided by him for those persons. He further provided that if the son and grandson attempted to break the will, [28]

> "the cash or the equivalent in value thereof in securities found in my estate."

set aside for them would go to charity, the interest uppermost in his mind. His widow, who lived frugally, had a $215,000.00 fortune in her own right with an income therefrom far in excess of her personal needs.

Take the will by its four corners, and it is evident that Mr. Welch intended that charities should receive the bulk of his estate. Therefore, said deductions should now be approved, and the claim for refund allowed.

[Endorsed]: Filed March 29, 1940. [29]

EXHIBIT "C"

Treasury Department
Office of
Commissioner of Internal Revenue

April 17, 1941

MT—ET—2152—Washington
Estate of George T. Welch
Date of death—April 15, 1937
Baker-Boyer National Bank of Walla Walla,
Executor
Baker Building
Walla Walla, Washington

Gentlemen:

Reference is made to the claim filed by the above-named estate of April 30, 1940, for refund of $23,382.78 Federal estate tax paid under the Revenue Act of 1936.

The claim is based on the contention that the amount of $171,535.74 shown in the return, Form 706, as a deduction under charitable, public and similar gifts and bequests and which was disallowed by the Bureau, should be allowed. Inasmuch as it cannot be definitely ascertained from the evidence at hand what amount, if any, indefeasibly vested in charity at the date of decedent's death under the provisions of his will, the claim filed by you for refund of $23,382.78 is rejected in its entirety.

Respectfully,
GUY T. HELVERING
Commissioner
(Signed) By D. S. BLISS
Deputy Commissioner [30]

EXHIBIT "D"

Treasury Department
Washington

March 19, 1941

MT—ET—2152—Washington
Estate of George T. Welch
Date of death—April 15, 1937

Baker-Boyer National Bank of Walla Walla,
Executor
Baker Building
Walla Walla, Washington

Gentlemen:

Reference is made to a deficiency in the amount of $1,687.24 outstanding against the above-named estate.

The estate has submitted evidence of payment of State estate, inheritance, legacy or succession taxes, in the amount of $688.67, which is herein allowed.

There remains a deficiency in the amount of $998.57 which has been assessed in accordance with the Technical Staff settlement of December 28, 1939.

Respectfully,
(Signed) D. S. BLISS
Deputy Commissioner [31]

EXHIBIT "E"

CLAIM

To Be Filed with the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp
(Date Received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Washington
County of Pierce—ss:

(Type of Print)

Name of taxpayer or purchaser of stamps Baker-Boyer National Bank of Walla Walla as executor of the estate of George T. Welch, dec'd

Business address Baker Bldg. Walla Walla Washington (Street) (City) (State)

Residence Baker Bldg. Walla Walla Washington

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed District of Washington

2. Period (if for income tax, make separate form for each taxable year) from ____, 19__, to ____, 19__

3. Character of assessment or tax Estate tax

4. Amount of assessment, $24,541.12; dates of payment 3/18/38; 11/1/39; 1/9/40; 4/25/41

5. Date stamps were purchased from the Government _____

6. Amount to be refunded $24,401.28 plus interest, or such other sum as is legally refundable

7. Amount to be abated (not applicable to income or estate taxes).....

8. The time within which this claim may be legally filed expires, under Section 810 of the Revenue Act of 1932, on 11/1/42; 1/9/43; 4/25/44

The deponent verily believes that this claim should be allowed for the following reasons:

See Attached Sheet

(Attach letter-size sheets if space is not sufficient)

Signed BAKER-BOYER NATIONAL BANK OF WALLA WALLA, as executor of estate of Geo. T. Welch, dec'd

By N. A. DAVIS as vice-president of Baker-Boyer National Bank

Sworn to and subscribed before me this 8th day of May 1941

C. R. FORTLE,

(Signature of officer administering oath)

Notary Public

(Title) [32]

The claim for refund should be allowed for the following reasons:

(a) That the value of the gross estate was erroneously increased from $226,303.00 to $228,244.50.

(b) That the will gave the widow a life estate;

That the will was so interpreted by the Superior Court of the State of Washington in and for Walla Walla County, in the regular probate proceedings in the matter of the estate of George T. Welch, to the effect that the widow had only a life estate, and that she could not invade the corpus; therefore, the two bequests mentioned below were fixed and certain.

(c) That the bequest of $12,500 (paragraph VIII of will) to the Board of Conference Claimants, Inc., of the Pacific Northwest Annual Conference of the Methodist Episcopal Church, subject to life estates of widow and grandson, should have been allowed by the Bureau as a deduction for estate tax purposes; that said amount for said purpose was definite and certain under the will.

(d) That the bequest of residue (paragraph IX of will), being $159,035.74, subject to life estate, to Baker-Boyer National Bank of Walla Walla, Washington, as trustee for the relief and support of worthy aged and poor and sick and maimed, and, if expedient, for erection of a memorial home for aged, and the establishment of a "revolving fund" for the support and education of worthy boys and girls, should have been allowed as a deduction for estate tax purposes; that said amount for said purpose was definite and certain under the terms of the will.

(e) The taxpayer paid the erroneous tax involved herein merely to expedite a judicial determination—A controversy arose whether the taxpayer owned any additional tax, and guided by the principle that it was cheaper to settle with the govern-

ment than win with costs added, the taxpayer accepted the written offer of the technical staff to settle for $7,843.29. The settlement was not approved, however, so the taxpayer waived his right to appeal to the Board and consented to an assessment which was paid in full. A claim for refund was then filed, and in a hearing on it another offer of settlement was presented to the taxpayer, a less sum than $7,843.29. This proved to be unacceptable also and the Bureau afterwards assessed $998.57 more tax "in accordance with the technical staff settlement of December 28, 1939." No settlement was ever made, so far as *to* taxpayer remembers, to include such a sum as $998.57 and the assessment of $998.57 was made in this manner so as to avoid giving the taxpayer a 90-day letter and an opportunity of a hearing before the Board of Tax Appeal. The taxpayer demands that the Commissioner shall give him such a letter.

The taxpayer is still acting as executor. All payments mentioned were made by the executor as such.

[33]

EXHIBIT "F"

Treasury Department
Washington

July 7, 1941

Office of
Commissioner of Internal Revenue
Address reply to
Commissioner of Internal Revenue
and refer to
MT—ET—2152—Washington
Estate of George T. Welch
Date of Death—April 15, 1937

Baker-Boyer National Bank
of Walla Walla, Washington, Executor
Baker Building
Walla Walla, Washington

Gentlemen:

Reference is made to the claim on Form 843 filed on May 9, 1941, on behalf of the above-named estate for the refund of Federal estate tax in the amount of "$24,401.28 plus interest, or such other sum as is legally refundable."

It appears from an examination of the record that the contentions of the taxpayer, subdivisions (a) to (d), inclusive, of the claim, involving the charitable deduction have heretofore had the consideration of the Pacific Division of the Technical Staff, and were the subject of the Bureau letter of April 17, 1941, rejecting the claim filed on behalf of the estate on April 30, 1940, for the refund of $23,382.78 Federal estate tax paid. Accordingly,

the instant claim is considered in the nature of a request or an application for reconsideration and reopening of the claim rejected on April 17, 1941.

Since it cannot be definitely ascertained from the evidence at hand what amount, if any, indefeasibly vested in charity at the date of the decedent's death under the provisions of his will, the Bureau sees no sound reason for departure from its previous determination.

The amount of $998.57 referred to in subdivision (e) of the instant claim constitutes a deficiency, as stated in the Bureau letter of May 7, 1941, addressed to your attorney, Burns Poe, due to the disallowance of credit for State inheritance taxes to that extent, but which may be eliminated by timely submission of evidence in support of said additional credit. In other words, there has been filed satisfactory evidence to support credit only in the amount of $688.67, which is less than 80 per cent of the Federal estate tax computed under the Revenue Act of 1926. If satisfactory evidence to support the balance of the 80 per cent credit is timely filed, claim therefor, if submitted within the time prescribed by the statute, will receive every consideration.

In view of the foregoing, the request in the form of the instant claim for the reopening and recon-

sideration of the rejected claim, is hereby denied and the claim rejected in its entirety.

Respectfully,

GUY T. HELVERING,
Commissioner.

By D. S. BLISS
Deputy Commissioner

[Endorsed]: Filed Aug. 19, 1941. [34]

[Title of District Court and Cause.]

ANSWER

Defendants, by their attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Frank Hale, Assistant United States Attorney for said District, for their answer to plaintiff's complaint herein, admit, allege and deny as follows:

I.

Admit the averments of paragraph I.

II.

Admit the averments of paragraph II.

III.

Admit the averments of paragraph III.

IV.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph IV, except

they admit that on April 15, 1937, the said George T. Welsh died at Walla Walla, Washington, and was survived by his widow, Carrie Welsh, of Walla Walla, Washington, who was born December 4, 1849, and by his son, Fred Welsh and a grandson, George [35] Allen.

V.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph V.

VI.

Admit the averments of paragraph VI.

VII.

Deny each and every averment of paragraph VII.

VIII.

Admit the averments of paragraph VIII.

IX.

Admit the averments of paragraph IX.

X.

Deny the averments of paragraph X, but admit and allege that in the audit of the return filed by the executor of said estate, the United States Commissioner of Internal Revenue tentatively allowed a credit of $1,687.24 for State inheritance taxes. In a letter of January 11, 1939, in which the credit was tentatively allowed, the executor was advised that before this credit is finally allowed it will be

necessary for the executor to submit a certificate from the Supervisor of Inheritance Taxes of the State of Washington showing payment of said taxes. Under date of March 11, 1941, a report was received from the Internal Revenue Agent in Charge at Seattle, Washington, enclosing a certificate from the Supervisor of Inheritance and Escheat Division of the State of Washington, showing payment of inheritance taxes by this estate in the amount of $688.67. The agent reported that the sum of $688.67 represented the total amount of inheritance taxes which has been paid by this estate. Under date of March 19, [36] 1941, a letter was directed to the executor by the said Commissioner, in which the executor was advised that the estate had submitted evidence of payment of said inheritance taxes in the amount of $688.67, which amount was then allowed.

The executor was also informed in the letter that there remained a deficiency in the amount of $998.57, which has been assessed in accordance with the Technical Staff settlement of December 28, 1939. This deficiency, plus interest thereon in the sum of $166.43, or a total of $1,168, was paid on April 24, 1941, to the Collector of Internal Revenue, Clark Squire.

XI.

Admit the averments of paragraph XI.

XII.

Admit the averments of paragraph XII.

Wherefore, defendants pray that plaintiff have and recover no relief herein and that judgment be

entered in their favor, dismissing plaintiff's complaint with costs.

J. CHARLES DENNIS
United States Attorney.
FRANK HALE
Assistant United States
Attorney.

Received copy of the within Answer this 25 day of Nov. 1941

BURNS POE

[Endorsed]: Filed Nov. 25, 1941. [37]

[Title of District Court and Cause.]

STIPULATION RE FACTS

It is hereby stipulated by and between the parties hereto by their respective attorneys that the following may be considered as agreed facts and evidence in this case without the necessity of either party introducing proof thereof and that the said facts and evidence may be considered by the Court as binding upon the parties hereto upon the trial of the above entitled cause, subject, however, to objection by either party upon the ground of immateriality.

I.

That the plaintiff is and at all times herein mentioned was a national banking corporation chartered and authorized to engage in business under the laws

of the United States, with its principal place of business at Walla Walla, Washington; and authorized under the laws of the State of Washington to act as executor.

II.

That defendant, Thor W. Henricksen is a resident of the above entitled district and at all times from the 11th day of July, 1936 to and including the 5th day of March, 1941, was acting Collector of Internal Revenue of the United States for [38] the District of Washington; that on the 6th day of March, 1941, the Defendant Clark Squire was appointed Collector of Internal Revenue for said district and at all times since has been and is now such Collector, and that the said Clark Squire at all times since has been and is now a resident of the above entitled District, and maintains an office therein.

III.

That the said George T. Welch, now deceased, did show, and the Plaintiff and its officer have shown true faith and allegiance to the Government of the United States, and that the decedent did not, and the Plaintiff and its officers have not, in any way aided, abetted or given encouragement or comfort to any person or persons or government in rebellion against the Government of the United States, nor did the decedent *or* nor has the Plaintiff or any of its officers aided, abetted or given encouragement or comfort to any sovereign government which is or has been at war with the United States.

IV.

That on April 15, 1937, the said George T. Welch died at Walla Walla, Washington; that he was survived by his widow, Carrie Welch, of Walla Walla, Washington, who was born on December 4, 1849; by his son, Fred Welch, who was born on June 28, 1880, and also by a grandson, George Allen, who was born on August 3, 1909.

V.

That the said George T. Welch and Carrie Welch were married and lived together as husband and wife for more than fifty years and until the day of his death; that all of the personal, real and mixed property, which belonged to him at the time of his death, was community property; that all of said community property belonging to said George T. Welch on April 15, 1937, was located entirely within the State of Washington. [39]

VI.

That when George T. Welch died, he left what is designated under the laws of the State of Washington, a non-intervention Will and Codicil, copies of which are attached to the Complaint and marked Exhibit "A" and which is made a part of this Stipulation by reference as completely as if set forth in full herein; that the said Will and Codicil were admitted to probate by the Superior Court of the State of Washington, in and for Walla Walla County, as the last will and testament of said George T. Welch on the 20th day of April, 1937; that on

said 20th day of April, the said Baker-Boyer National Bank, plaintiff herein was duly appointed executor of said estate and qualified as such and at all times since the said 20th day of April has been and is now the duly qualified and acting executor of said estate; that said court authorized said bank to execute said will and codicil; that a copy of said will and codicil, may be introduced in evidence herein.

VII.

(See Paragraph VIII of Complaint)

That an estate tax return for said estate filed by the said executor with the said acting collector showed a gross valuation of $226,303.96 and a net valuation of $7,325.42 for estate tax purposes; that the original estate tax shown on said return and paid by the plaintiff was $146.50; that the said executor took as deductions in said return all bequests for religious, charitable, scientific and educational purposes, namely to-wit:

(a) a bequest of $12,500.00 to the Board of Conference Claimant Inc. of the Pacific Annual Conference of the Methodist Episcopal Church, subject to the life estate of the widow and the grandson of said decedent, to be used by said Board for the [40] maintenance and support of retired ministers of said denomination;

(b) a bequest of $159,035.74 residue, subject, to the life estate of the widow of said decedent, to the Baker-Boyer National Bank as trustee for the relief of aged, indigent and poor, and the maintenance of the sick and maimed and for the construc-

tion and maintenance of a memorial hospital and home for them at Walla Walla, Washington, and for the support and education of worthy boys and girls of Walla Walla County.

VIII.

(See Paragraph IX of the Complaint)

That the office of the Internal Revenue Agent in charge at Seattle, Washington, proposed to raise the gross valuation of the estate to $228,244.50 and also to increase the net estate to $180,301.68 by the disallowance of the forementioned bequests thereby increasing the estate tax $21,417.55 over the $146.50 already paid: that the additional tax of $21,417.55 was paid with interest to the said acting collector in this manner to-wit:

Date of Payment	Tax Paid	Interest Paid
Nov. 1, 1939	$ 7,843.29	$ 609.17
Jan. 9, 1940	13,574.26	1,209.56
Total	$21,417.55	$ 1,818.73

that the aforesaid additional tax was paid upon the understanding that the payment thereof would not prejudice the right of the plaintiff to file a claim for refund of all payments of estate tax and interest made to the said acting collector; that on the 30th day of April, 1940, the plaintiff filed with the defendant Thor W. Henricksen, as such acting collector, claim for refund of said amounts so paid, a copy of which claim, marked Exhibit "B" is attached to the Complaint and which is made a part of this Stipulation by this reference for all pur-

poses; that a photostatic copy of said claim will be introduced in evidence herein; [41] that on or about the 17th day of April, 1941, plaintiff received notice of rejection of said claim, a copy of which notice marked Exhibit "C", is attached to the Complaint, and by this reference made a part of this Stipulation for all purposes; and that said notice may be introduced in evidence herein.

IX.

(See Paragraph XI of the Complaint)

That on the 9th day of May, 1941, the plaintiff filed with the defendant Clark Squire, as such Collector, a supplemental claim for refund in the amount of $24,401.25 plus interest, a copy of which claim, marked Exhibit "E", is attached to the Complaint and by this reference made a part of this Stipulation; that a photostatic copy of said claim will be introduced in evidence herein; that on the 11th day of July, 1941, plaintiff received notice of rejection of said claim, dated July 7, 1941 a copy of which notice is attached to the Complaint, marked Exhibit "F" and by this reference is made a part of this Stipulation; and that said notice may be introduced in evidence herein.

X.

(See Paragraph XII of the Complaint)

That all the actions of the defendants were performed by them as officers of the Government of the United States, under rules and instructions of the Commissioner of Internal Revenue; and that all moneys collected by them as aforesaid from the plain-

tiff was paid by them to the Treasury of the United States.

XI.

That parties hereto, by their respective attorneys, reserve the right to introduce any further evidence and testimony that they deem proper; provided, however, that no such evidence and testimony shall be in contradiction of the foregoing stipulated facts. [42]

XII.

That shortly after March 19th, 1941, the plaintiff received a letter from D. S. Bliss, Deputy Commissioner of Internal Revenue, a copy of which is attached to the Complaint and marked Exhibit "D" and by this reference is made a part of this Stipulation; that said letter may be introduced into evidence herein; that on the 25th day of April, 1941, the plaintiff paid the additional assessment to which reference is made in said letter to the defendant, Clark Squire, as Collector of Internal Revenue, together with interest thereon in the amount of $166.43, making a total payment of $1165.00.

XIII.

If it becomes material to determine the value of any remainder interest dependent upon the continuation of, or termination of more than one life, the Commissioner shall furnish the applicable factor and such factor shall be accepted as correct in making the computation.

XIV.

That there may be introduced into evidence copies of the following papers filed in the probate proceeding in the estate of George T. Welch, deceased, the papers to be certified by the Clerk of the Superior Court of Walla Walla County:

Order dated March 29, 1940;—Exhibit H.

Final Account and Report;—Exhibit I.

Stipulation for Partition;—Exhibit J.

Decree of Distribution;—Exhibit K.

Petition in Probate dated March 22, 1940;—Exhibit N.

XV.

That the parties accept as correct the sum of $228,244.50 as the gross valuation of the said estate, which sum represents an increase of $1,940.54 over the gross estate as shown by the estate tax return filed with the said acting collector by the said executor. [43]

XVI.

That the copy of the Internal Revenue Agent's report sent to the plaintiff under date of January 11, 1939, may be admitted in evidence.

XVII.

That a photostatic copy of the estate tax return of the estate of George T. Welch, is attached hereto as Exhibit G by defendants and put in evidence.

XVIII.

That the total amount of inheritance tax paid to the State of Washington was $688.67. Exh. N

XIX.

That the alleged deduction of $159,035.74 claimed on the estate tax return filed by the executor was composed of two items, to-wit: (a) the alleged value of the remainder of the $30,000.00 bequest made by Paragraph VII of the Will as amended by the Codicil; (b) the alleged value of the remainder interest in the bequest provided for by Paragraph IX of the Will.

Dated this 3rd day of February 1942.

BURNS POE
CAMERON SHERWOOD
Counsel for Plaintiff.
J. CHAS. DENNIS
THOMAS R. WINTER
Counsel for Defendants

[Endorsed]: Filed Feb 3, 1942. [44]

[Title of District Court and Cause.]

MEMORANDUM OPINION

Black, District Judge
September 29, 1942

Mr. Burns Poe
Elizabeth Shackleford
Puget Sound Bank Building
Tacoma, Washington

Mr. Cameron Sherwood
Mr. Marvin Evans
Baker Building
Walla Walla, Washington
For Plaintiff

Mr. J. Charles Dennis
United States Attorney

Mr. Harry Sager
Assistant United States Attorney

Mr. Thomas R. Winter
Special Attorney, Bureau of Internal Revenue,
Seattle, Washington
For Defendants [45]

The plaintiff executors seeks in this action a refund of about $23,000.00 of estate taxes and interest paid upon the estate of George T. Welch, deceased. The executor contends that the Commissioner of Internal Revenue incorrectly disallowed deductions approximating $170,000.00 from the return for con-

cedely charitable bequests. The Commissioner's position is that under the will the widow was given power to invade and exhaust the corpus of such charitable bequests and that therefore they were not deductible. The executor takes the position that the will gave the widow no such power at all, and further that the construction of the will by a probate court of the State of Washington of general jurisdiction and also by the widow, which constructions denied her any such right, are conclusive.

George T. Welch, the decedent, a retired farmer of Walla Walla, Washington, died on April 15, 1937 at the age of ninety-five years, leaving surviving him his widow, Carrie Welch, then aged eighty-seven years; his son, Fred B. Welch, and his grandson, George B. Allen. He left an estate of $226,303.98, this being one-half of the community estate. Under the community property laws of the State of Washington the other one-half belonged to the widow. [46]

Mr. Welch left a will dated in 1930 and a codicil dated in 1931. Under the will, as modified by the codicil, he made two cash bequests of $500.00 each, and gave, devised and bequeathed to his wife, Carrie Welch, a life estate in all the rest, residue and remainder of his estate. Subject to such life estate of Carrie Welch, he gave his son, Fred B. Welch, a life estate in $30,000.00 in cash or securities found in his estate, and also subject to the life estate of his wife, gave his undivided one-half interest in certain community real property to his said son "as his absolute estate". Likewise, subject to the

life estate of Carrie Welch, as aforesaid, he gave his grandson, George B. Allen, a life estate of $12,500.00 in cash or securities as found in his estate. As to such $12,500.00 the will gave and bequeathed the remainder in trust for charitable use by the Board of Conference Claimants, Inc. of the Pacific Northwest Annual Conference, Methodist Episcopal Church. All the remainder of his estate, subject to the wife's life estate in all of same, as above, and subject to the son's second life estate as to such $30,000.00 and subject to the son's said absolute estate in said real property, was given, devised and bequeathed to the Baker-Boyer National Bank as Trustee for the concededly charitable purposes of providing education for boys and girls, providing support for the poor, aged and infirm, and erecting a home for the aged as a memorial to the testator and his wife.

The executor insists that the chief and paramount intention of George T. Welch in the making of his will and codicil, as evidenced thereby and as shown by the admitted testimony introduced at the trial, was to provide for the charities which the Commissioner rejected as the basis for deductions from the taxable net estate. The Commissioner [47] concedes that such were and are charities and would be deductible except for what he contends was the authority for the widow under the fifth paragraph of the will to invade the corpus of said charitable bequests.

Paragraph V of the will gave, devised and bequeathed "unto my said wife, Carrie Welch, for and

during her life-time, should she survive me, all the rest, residue and remainder of my estate, both real and personal, including the rents, issues and profits therefrom, and of whatsoever the same may consist and wheresoever situated, with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee, hereinafter named, in trust, nevertheless, for the uses and purposes hereinafter mentioned, to-wit: concededly charitable uses and purposes.

In the succeeding paragraphs of the will the testator a number of times used the words "subject to the life estate hereinbefore given, devised and bequeathed unto my said wife, Carrie Welch, in my estate, should she survive me, as aforesaid". Moreover, in paragraph IX of the will, which specifically sets forth the powers and duties of the charitable trustee, it is stated: "Subject to each and every of the foregoing provisions of this my Last Will and Testament, including the life estate in my said estate hereinbefore given, devised and bequeathed unto my said wife, Carrie Welch, should she survive me, I do hereby give, devise and bequeath all the rest, residue and remainder of my property * * * whether real, personal or mixed, * * * unto my said Trustee, The Baker-Boyer National Bank, of Walla Walla, Washington, to have and to hold the same, together with all the privileges and appurtenances thereunto belonging, and [48] all income and profits arising therefrom, to my said Trustee, perpetually,

in trust" for the charitable purposes specified. Said Paragraph IX specifically gives said charitable Trustee authority over "the identical securities, properties, or investments received by it from my estate, whether it be at my death or at the death of my said wife, Carrie Welch, should she survive me" and specifically authorizes it "To grant, bargain, sell, exchange, convert and lease, * * * and * * * to pledge, assign, partition, subdivide and distribute * * * the income and principal of my said trust estate * * *. To receive and collect all income * * *. * * * to determine what shall constitute principal of the trust estate and what shall constitute gross income therefrom or net income available under the terms of this trust." The aforesaid use in the will of the term "identical" is extremely significant.

While the will thus so expressly, positively and definitely gives the Trustee power to sell and use the principal and income, or either, of the trust estate, such instrument now here gives the said widow any express authority to sell, convert or dispose of any of the securities or other properties of the estate of any express authority to invade the principal or corpus of the estate in any manner whatsoever.

But the Commissioner contends that the language in said fifth paragraph, to-wit: "with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee," does by necessary implication give her

such authority to invade the corpus of such charitable bequests to the Trustee, as to make uncertain how much, if any, of [49] such charitable bequests will exist at the time of her death. The Trustee insists that under the authority of Ithaca Trust Company v. United States, 279 U. S. 151; Humes v. United States, 276 U. S. 487; Pennsylvania Company for Insurance on Lives, etc. v. Brown, 70 F. 2d 269; Gammons v. Hassett, 121 F. 2d 229; Mississippi Valley Trust Company v. Commissioner, 72 F. 2d, 197; Burdick v. Commissioner, 117 F. 2d 972; United States v. Provident Trust Company, 291 U. S. 272; Farrington v. Commissioner, 30 F. 2d, 915, and similar cases that "the widow, having such a right to use any part of the corpus of the estate, there was no bequest to charity within the meaning of Section 303 (a) (3) of the Revenue Act of 1926 as amended, "26 U. S. C. A. Sec. 812 (d).

Plaintiff, however, contends that the widow had no authority of any kind except the right to the income of the life estate. Plaintiff further insists that even if there was any theoretical implied authority to use some small part of the corpus, which plaintiff in no wise admits, that actually the holdings of Ithaca Trust Co. v. United States, supra, and United States v. Provident Trust Company, supra, establish that the charitable bequests are still deductible, and plaintiff, in addition, cites numerous Federal and Supreme Court additional decisions, including particularly Mead v. Welch, 95 F. 2d 617 (CCA - 9th); Commissioner v. Bonfils Trust, 115 F. 2d 788; Sanderson, executor, v. Commissioner, 18

B. T. A. 221; and Boston, etc. Co. and Pfaff, executors, v. Commissioner, 21 B. T. A. 394, to the same effect.

The testator's intent is to be ascertained from the will as a whole and not from any isolated portion or portions. The intention of the testator as gathered from all parts of the will is to be given effect. Any doubtful or ambiguous expression cannot be permitted to defeat the obvious intent [50] of the testatory. 69 C. J. 52, 53, 59, 62, 63; Cowles v. Matthews, 197 Wash. 652, at page 654; Shufeldt v. Shufeldt, 130 Wash. 253; Evans v. Ockershausen, 100 F. 2d 695.

As stated In re Harper's Estate, 168 Wash. 98, at page 106, "In determining the meaning to be given to the words used in a will, extrinsic evidence of the surrounding facts and circumstances may be considered, not for the purpose of proving intention as an independent fact, but as an aid to a right understanding of the language that has been used."

To the same effect are: In re Holmes' Estate (Wisc.) 298 N. W. 638; In re Doepkes' Estates, 182 Wash. 556; Cotton v. Bank of California, 145 Wash. 503; Shufeld v. Shufeldt, supra; 69 C. J. p. 63 Sec. 1120.

The purpose of Congress in providing for deductions of charitable bequests was to encourage testators to make the same. A charitable bequests is a favorite of the law and of the courts. The courts are solicitous to give that construction which will sustain rather than defeat a charitable deduction.

During the trial the court reserved ruling upon

defendant's objections as to the admission of certain evidence while allowing the testimony of the witnesses to be heard as offers of proof.

This trial court is of the opinion that it is within its discretion to overrule all of such objections and to admit all of such testimony. However, the objections of defendant will be sustained as to the testimony concerning those certain conversations appearing in the transcript as followed: commencing with the last word in line 3 to line 17, inclusive, page ; commencing with the last word in line 21, page 11, to line 1, page 12, inclusive; lines 8 to [51] 17, inclusive, on page 13; lines 3 to 13; inclusive, page 14; line 3 on page 52 to line 1 on page 53, inclusive.

The objections to all of the balance of the offers of proof are overruled. All of the remainder of the offers of proof is properly admitted in evidence for the purpose of showing the situation of the testator and his wife and the surrounding circumstances at the time of the execution of the will.

Under the uncontradicted testimony admitted in evidence it appears that at the time the will was executed the wife's half interest in the community estate approached a value of a quarter of a million dollars; that when the will was made she was about eighty years of age, an invalid, with a brief life expectancy, and of fixed habits of simple frugality. Certainly the income from her one-half of the community estate plus the income from the life estate in her husband's property provided by his will made

absolutely unnecessary any invasion by her of the corpus of any portion of her husband's estate.

After a careful analysis of the "four corners" of the will and codicil, of the evidence introduced at the trial, together with those matters which were stipulated by the parties, of said Section 303 (a) (3), 26 U. S. C. A. Sec. 812 (d), of the decisions of the Board of Tax Appeals, of the United States Supreme Court and of the Federal Courts, as well as of this state, I am convinced that plaintiff is entitled to prevail.

The widow was given no authority at all by the terms of the will to invade the corpus of such charitable remainders. It seems clear to me that likewise there was no implied authority so to do. The charitable bequests were remainders which vested in the Trustee at the time of the testator's death with merely the enjoyment deferred. There was nothing [52] doubtful as to the identity of the trustee to whom such remainders were given, devised and bequeathed, nor of the certainty of the life estates being terminated.

From a consideration of the will and of the surrounding circumstances or from a consideration of the will alone it is apparent that the primary purposes of the testator was to provide for these charitable bequests. He expressly and clearly gave the Trustee authority over the principal of said bequests. But nowhere did he give the widow any express authority over any principal of his estate. The contrast between the express authority of the Trustee over the principal of the remainder and no

express authority to the wife as to the principal is extremely cogent in establishing that he gave her no such authority by implication.

The situation and circumstances of the husband and wife and of his interest in said charities before the will and codicil were executed, at the time of the execution of same, and after their execution to the time of his death demonstrate that the testatory had no expectation that his wife either needed to or would desire to invade the corpus of the estate at all. The history of events after his death is also very persuasive. For the widow never in the slightest degree invaded or expressed any wish to invade any of the principal or corpus of her husband's estate. In fact, she entered into an agreement recognizing that she had no such authority. See 69 C. J. p. 125, Sec. 1167.

Moreover, the Superior Court of the State of Washington by decree of distribution and by an order holding the values of the bequests not taxable by the state because charitable, decreed that under the terms of the will the widow had no power to invade the corpus. Such decision of the Superior Court was pursuant to the widow's understanding of her [53] rights under the will and while such decision that she had no right to invade the corpus deprived the State of Washington of more than $30,000.00 inheritance taxes the state did not appeal from such decision.

In Bayer v. Bayer, 83 Wash. 430, at p. 435, it is said: "Under the (state) constitution, the superior court is a court of general jurisdiction. It has jur-

isdiction of equity cases, actions at law, and proceedings in probate. * * * The constitution does not make the superior courts probate courts. On the contrary, it makes them courts of general jurisdiction including 'all matters of probate'. As a court of general jurisdiction it has the power to construe wills at the suit of proper parties." Also see Alaska, etc. Co. v. Noyes, 64 672 at 676.

It would, therefore, seem that there is much merit in plaintiff's contention that the Commissioner is bound by the decree of distribution by a Washington court of general jurisdiction and its order denying to the State of Washington any inheritance tax on such charitable bequests because under such construction of the terms of the will the widow had no right to invade the corpus. In such connection plaintiff cites: Uterhart v. U. S. 240 U. S. 598; Freuler v. Helvering, 291 U. S. 35; Sharpe v. Commissioner, 107 F. 2d 13; Hoxie v. Page, 23 F. Supp. 905.

Regardless of whether such decree of distribution and such order of the Superior Court of Washington are binding and controlling certainly such court's interpretation is most persuasive inasmuch as it clearly is in accord with the intention of the testator.

Even if there was by implication a theoretical right of invasion I am convinced that United States v. Provident Trust Company, 291 U. S. 272; Ithaca Trust Company v. United States, 279 U. S. 151; and Mead v. Welch, 95 F. 2d, 617, are still [54] decisive against the defendant.

The decision of Mead v. Welch, supra, is particularly in point. Although in that case the widow was given the express authority "to sell, convey, assign, transfer, collect, invest, and reinvest" the corpus it was properly held that in view of all of the provisions of the will and "the further circumstance, disclosed in the record, that Mrs. Mead had a very large estate of her own" that the charitable bequest should have been deducted. In that case the decedent was a resident of California where, as the decision points out, "a life estate with power to sell the property is not, because of such power of sale, enlarged to a fee estate." In this case the decedent was a resident of the State of Washington where likewise, as stated In re Gochnour's Estate, 192 Wash. 92 at p. 93, it is held that the power of absolute disposal in the husband by the terms of the will did not prevent the devise and bequest to him constituting a life estate.

This court is not unmindful of the interpretation which defendant places upon the provisions that the widow is not to be limited in her expenditures or required to make an accounting thereof and that the then remainder shall go to the Trustee. But all of said words must be interpreted in the light of the provisions and purposes of the will as a whole and in the light of the practical meaning of such terms.

By common understanding, as well as by definition of lay or legal dictionary, the term "expenditures" generally contemplates paying out. See also In re

Homes' Estate, 289 N. W. 638, syllabus (7), also p. 641; Suppiger v. Enking (Idaho) 91 P. 2d. 362, syllabus (1).

Under the unquestioned law applicable to life estates the life tenant is entitled to the rents, income and profits. 17 R. C. L. p. 628 Sec. 18. It is evident that the testator wished to free [55] his invalid wife during her short expectancy, in the event she should survive her husband at all, from being under the fear that she would be interferred with as to such expenditures as she might make of the income and from the fear that she would be required to make any accounting of such expenditures of the income. In the closing paragraph of his will the testator used these words: "In order that my said wife, Carrie Welch, may be relieved of the responsibility in the administration upon my estate, and the responsibility incident thereto, I do hereby nominate and appoint my said Trustee * * * the executor of this my Last Will and Testament."

The apparent theory of the defendant seems to be that the lack of such limitation as to expenditures and the lack of the necessity of her to account for her expenditures, while not in themselves giving her lawful authority to invade the corpus, would make it possible for her to wrongfully invade the corpus.

In Boden v. Johnson, 47 S. W. 2d. 155 it was held that the mother, entrusted with property, the proceeds of which were to be used to support the minor children, was accountable for failure to use the income for the children's benefit although the contract stipulated that she should not be required

to account for "expenditures", for the reason that while not required to account for the expenditures that she was required to use the income for the children's benefit. Similarly in this case the widow, while not required to account for her expenditures of the income of the life estate, would not be permitted to wrongfully invade the corpus.

"Words omitted from a will may be supplied by the court whenever necessary to effectuate the testator's intention as [56] expressed in the will;" 69 C. J. 82 (Sec. 1140); In re Peters' Estate, 101 Wash. 572. The words "of income" it would seem might very properly be supplied immediately following the term "expenditures" in said paragraph V.

Actually it is more reasonable that the testator used the words "the then remainder" with the idea that the then remainder would represent the corpus plus a portion of the unexpended income rather than represent merely the substantially diminished corpus.

Corroborating such very reasonable assumption is the language employed by him in paragraph VII of the will and in the codicil with reference to the $30,000.00 bequest, which was first subject to the wife's life estate and then to the son's life estate with the remainder to the trustee for a specified charity. In each instance he mentioned "unused net income" as a possible addition to the principal. Paragraph VII of the will directed that the net income as to the $30,000.00 during the life estate of the son should be paid to him, and directs that all

such net income after the wife's and son's death should be paid to the specified charity. How can we say that the testator did not assume that the period when the net income might not all be used would be during his wife's life estate? In the codicil, for example, the testator, after reciting the right in his wife in connection therewith, employs these words: "I do hereby give and bequeath the principal of said trust fund, with any remaining unused net income therefrom, if any there be, conditioned as above, unto my said Trustee". Therefore "the then remainder" can be considered as the corpus plus "any remaining unused net income therefrom".

If the defendant is correct in his interpretation of the lack of limitation on expenditures, the lack of requirement [57] for accounting, and the use of the term "then remainder" with reference to the wife's life estate, giving her the right to invade and during her life completely exhaust the remainders, then the wife likewise by reason thereof had the right to invade and dispose of the testator's undivided one-half interest in certain realty by Paragraph VI of the will given, devised and bequeathed to the son, subject to the wife's prior life estate. Defendant's brief asserts that Carrie Welch by reason of such language in Paragrph V not only had the right to invade, sell and dispose of the entire corpus but also even to give away so much thereof as she might wish. If such contention is sound then she could during the existence of her life estate by quit claim deed give away the son's vested remain-

der in said real estate. It does not appear to me that anyone would seriously contend that the grantee of any deed from Carrie Welch, whether of gift or sale, could hold title to such real property against the son.

Unquestionably, the father never intended that the widow, by virtue of her life estate in said half interest in such real property, could deprive the son of his invested remainder therein. And if she could not invade the corpus of said real property it necessarily follows that she could not invade the corpus of the charitable bequests. The son's remainder in said real property was subject to the same life estate and subject to the same provisions of no limitation on expenditures, no accounting, and the "then remainder" as were the charitable bequests.

In the same paragraph V upon which defendant relies, we find this language: "but should I survive my said wife, Carrie Welch, then upon my death I do hereby give, devise and bequeath all the "then rest, residue and remainder of my estate * * * unto my said Trustee". Obviously, the "then re- [58] mainder" a few lines before in the same paragraph V with reference to the wife refer to the same type of a "then rest, residue and remainder" as the testator would leave if she predeceased him. Then "then" in Paragraph V used in connection with the wife is no different in type, degree, meaning or implication than the similar "then" a few lines later in the same paragraph used in connection with the testator himself in the event she pre-

deceased him. Since the "then" in Paragraph V with reference to the "rest, residue and remainder" at the death of the testator of necessity refers to the state after the previously mentioned bequests have been carved therefrom, it follows that said "then" used in connection with the widow similarly refers to the same testator's estate after the same bequests have been carved from such estate. Welch v. Mead, supra.

The defendant further urges that the spendthrift restrictions on alienations of the income of their life estates by the son and grandson and lack of any such restriction upon the wife is further proof of her implied power to invade the corpus. The contrary appears. There was no provision restricting either the son or grandson from invading the corpus. There was no necessity as they had no such authority.

Likewise, there was no provision to restrict the wife from invading the corpus of the life estate. There was no need because she likewise had no authority nor any such inclination. Of course, there was no restriction upon her alienation of her right to income from her life estate as there was no reason at all for any spendthrift precaution as to her.

That portion of section 81.46 of Regulations 105, issued in 1942 by the United States Treasury Department, Bureau of Internal Revenue, cited by plaintiff, is not, of course, [59] applicable to this cause, the decedent having died in 1937. Section 81.1 thereof specifies that such Regulations 105

"apply only to estate taxes imposed by chapter 3 of the Internal Revenue Code (53 Stat., Part 1) on the estates of decedents dying after February 10, 1939".

For the reasons stated in this opinion and in view of the testator's intent as disclosed by the will and the evidence admitted in this cause and by virtue of the court decisions herein cited plaintiff is entitled to a refund of the taxes and interest paid upon the worth at time of testator's death of said charitable bequests, which bequests as in Mead v. Welch, supra, were "ascertainable on an actuarial basis and should have been deducted in determining the estate tax."

Dated September 29th, 1942.

LLOYD L. BLACK
United States District Judge

[Endorsed]: Filed Sept. 29, 1942. [60]

[Title of District Court and Cause.]

NOTICE TO J. CHARLES DENNIS, U. S. ATTORNEY, AND THOMAS R. WINTER, SPECIAL ATTORNEY, BUREAU OF INTERNAL REVENUE, ATTORNEYS FOR DEFENDANTS

You and Each of You will please take Notice that within ten days after the Commissioner of Internal Revenue furnished the applicable factors as required by Paragraph XIII of the Stipulation of

the parties herein, the undersigned Attorneys for the Plaintiff have filed with the Clerk of the above entitled Court and herewith serve upon you, as Attorneys for the Defendants, Findings of Fact and Judgment proposed by the Plaintiff and will request the above entitled Court to sign the same at the expiration of fifteen days from the date hereof.

Dated this 21st day of January, 1943.

BURNS POE
Attorney for Plaintiff.

Receipt is hereby acknowledged this 21st day of January, 1943, by the undersigned Attorney for the defendants of copy of foregoing Notice.

J. CHARLES DENNIS
United States District Attorney, Attorney for Defendants.

[Endorsed]: Filed Jan. 23, 1943. [61]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter, having come on regularly for trial on the third day of February, 1942, before the undersigned Judge of the above entitled Court, sitting without a jury, trial by jury having been waived, the plaintiff appearing by Burns Poe, Cameron Sherwood and Marvin Evans, and Eliza-

beth Shackleford, its Attorneys, and the defendants Thor W. Henrickson, formerly Acting Collector of Internal Revenue for the District of Washington; and Clark Squire, Collector of Internal Revenue for the District of Washington, appearing by J. Charles Dennis, United States Attorney, Oliver Malm, Assistant United States Attorney, and Thomas R. Winter, Special Attorney, Bureau of Internal Revenue, as their Attorneys, and the evidence on behalf of both parties having been submitted, and the Court having considered argument of counsel for the respective parties and having heretofore entered his opinion in writing based upon all of the evidence, the stipulation of the parties and said argument, which opinion and stipulation are hereby incorporated in these Findings by this reference as fully as if set forth herein verbatim, and the Commissioner of Internal Revenue having on the 20th day of January, 1943, furnished the applicable factors as provided by paragraph XIII of the stipulation of the parties, the Court does hereby make the following: [62]

FINDINGS OF FACT

I.

That the plaintiff is and at all times herein mentioned was a national banking corporation chartered and authorized to engage in business under the laws of the United States, with its principal place of business at Walla Walla, Washington; and authorized under the laws of the State of Washington to act as executor.

II.

That defendant, Thor W. Henricksen is a resident of the above entitled district and at all times from the 11th day of July, 1936 to and including the 5th day of March, 1941, was acting collector of Internal Revenue of the United States for the District of Washington; that on the 6th day of March, 1941, the Defendant Clark Squire was appointed Collector of Internal Revenue for said district and at all times since has been and is now such Collector, and that the said Clark Squire at all times since has been and is now a resident of the above entitled District, and maintains an office therein.

III.

That the said George T. Welch, now deceased, did show, and the Plaintiff and its officer have shown true faith and allegiance to the Government of the United States, and that the decedent did not, and the Plaintiff and its officers have not, in any way aided, abetted or given encouragement or comfort to any person or persons or government in rebellion against the Government of the United States, nor did the decedent or nor has the Plaintiff or any of its officers aided, abetted or given encouragement or comfort to any sovereign government which is or has been at war with the United States. [63]

IV.

That on April 15, 1937, the said George T. Welch died at Walla Walla, Washington; that he was survived by his widow, Carrie Welch, of Walla Walla,

Washington, who was born on December 4, 1849; by his son, Fred Welch, who was born on June 28, 1880, and also by a grandson, George Allen, who was born on August 3, 1909.

V.

That the said George T. Welch and Carrie Welch were married and lived together as husband and wife for more than fifty years and until the day of his death; that all of the personal, real and mixed property, which belonged to him at the time of his death, was community property; that all of said community property belonging to said George T. Welch on April 15, 1937, was located entirely within the State of Washington.

VI.

That when George T. Welch died, he left what is designated under the laws of the State of Washington, a non-intervention will and codicil, copies of which have been admitted in evidence herein pursuant to the stipulation of the parties; that the said Will and Codicil were admitted to probate by the Superior Court of the State of Washington, in and for Walla Walla County, as the Last Will and Testament of said George T. Welch on the 20th day of April, 1937; that on said 20th day of April, 1937, the said Baker-Boyer National Bank, plaintiff herein, was duly appointed executor of said estate and qualified as such and at all times since the said 20th day of April, 1937, has been and is now the duly qualified and acting executor of said

estate; that said Court authorized said bank to execute said Will and Codicil. [64]

VII.

That an estate tax return for said estate filed by the said executor with the said acting Collector showed a gross valuation of $226,303.96 and a net valuation of $7,325.42 for estate tax purposes; that the original estate tax shown on said return and paid by the plaintiff was $146.50; that the said executor took as deductions in said return all bequests for religious, charitable, scientific and educational purposes, namely, to-wit:

(a) A bequest of $12,500.00 to the Board of Conference Claimant Inc. of the Pacific Annual Conference of the Methodist Episcopal Church, subject to the life estate of the widow and the grandson of said decedent, to be used by said Board for the maintenance and support of retired ministers of said denomination;

(b) A bequest of $159,035.74 residue, subject to the life estate of the widow of said decedent, to the Baker-Boyer National Bank as trustee for the relief of aged, indigent and poor, and the maintenance of the sick and maimed and for the construction and maintenance of a memorial hospital and home for them at Walla Walla, Washington, and for the support and education of worthy boys and girls of Walla Walla County, Washington.

VIII.

That the office of the Internal Revenue Agent in charge at Seattle, Washington, raised the gross

valuation of the estate to $228,244.50 and also increased the net estate to $180,301.68 by the disallowance of the forementioned bequests thereby increasing the estate tax $21,417.55 over the $146.50 already paid; that the additional tax of $21,417.55 was paid with interest to the said acting Collector in this [65] manner, to wit:

Date of Payment	Tax Paid	Interest Paid
Nov. 1, 1939	$ 7,843.29	$ 609.17
Jan. 9, 1940	13,574.26	1,209.56
Total	$21,417.55	$ 1,818.73

that the aforesaid additional tax was paid upon the understanding that the payment thereof would not prejudice the right of the plaintiff to file a claim for refund of all payment of estate tax and interest made to the said acting collector; that on the 30th day of April, 1940, the plaintiff filed with the defendant Thor W. Henricksen, as such acting collector, claim for refund of said amounts so paid, a copy of which claim has been admitted in evidence herein pursuant to the stipulation of the parties; that on or about the 17th day of April, 1941, plaintiff received notice of rejection of said claim, a copy of which notice has been admitted in evidence herein pursuant to the stipulation of the parties.

IX.

That on the 9th day of May, 1941, the plaintiff filed with the defendant Clark Squire, as such Collector, a supplemental claim for refund in the amount of $24,401.25 plus interest, a copy of which

claim has been admitted in evidence herein pursuant to the stipulation of the parties; that on the 11th day of July, 1941, plaintiff received notice of rejection of said claim, a copy of which notice has been admitted in evidence herein pursuant to the stipulation of the parties.

X.

That all the actions of the defendants were performed by them as officers of the Government of the United States, under rules and instructions of the Commissioner of Internal [66] Revenue; and that all moneys collected by them as aforesaid from the plaintiff was paid by them to the Treasury of the United States.

XI.

That shortly after March 19th, 1941, the plaintiff received a letter from D. S. Bliss, Deputy Commissioner of Internal Revenue, a copy of which has been admitted in evidence herein by stipulation of the parties; that on the 24th day of March, 1941, the plaintiff paid the additional assessment to which reference is made in said letter to the defendant, Clark Squire, as Collector of Internal Revenue, together with interest thereon in the amount of $166.43, making a total payment of $1165.00.

XII.

That the total amount of inheritance tax paid to the State of Washington was $688.67.

XIII.

That the deduction of $159,035.74 claimed on the estate tax return filed by the executor was composed of two items, to-wit:

(a) the value of the remainder of the $30,000.00 bequest made by Paragraph VII of the Will as amended by the Codicil;

(b) the value of the remainder interest in the bequest provided for by Paragraph IX of the Will.

XIV.

That it is material to determine the value of the following remainder interests dependent upon the continuation of or termination of more than one life, to-wit:

The remainder interest of the Board of Conference Claimants, Inc. of the Pacific Annual Conference of the Methodist Episcopal Church in the bequest of $12,500 dependent upon the termination of the lives of the widow and grandson of the deceased; [67]

The remainder interest of the Baker-Boyer National Bank as trustee for certain charitable purposes in the bequest of $30,000 dependent upon the termination of the lives of the widow and son of the deceased;

That the applicable factor for determining each of such remainder interests is respectively 0.29815 and 0.55761;

That it is material to determine the value of the remainder interest in the residue of the estate upon the termination of the life of Carrie Welch, and that the applicable factor is 0.88024.

XV.

That the Board of Conference Claimants, Inc., of the Pacific Annual Conference of the Methodist Episcopal Church is a corporation organized for religious and charitable purposes in the sense that the words "religious" and charitable" are used in Section 812 (d) of the Internal Revenue Code, and that no part of the net earnings of said corporation inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation; that the bequests to the Baker-Boyer National Bank as trustee are to be used by such trustee exclusively for charitable and educational purposes in the sense that the words "charitable" and "educational" are used in Section 812 (d) of the Internal Revenue Code.

XVI.

At the time the will was executed the wife's half interest in the community estate approached a value of a quarter of a million dollars; that when the will was made she was about eighty years of age, an invalid, with a brief life expectancy and of fixed habits of simple frugality; that the income from her one-half of the community estate plus the income from the life [68] estate in her husband's property amply provided for her and made unnecessary any invasion by her of the corpus of any portion of her husband's estate. The widow was given no authority at all by the terms of the will to invade the corpus of the charitable remainders, and there was no im-

plied authority so to do. The charitable bequests were remainders which vested in the trustee at the time of the testator's death with merely the enjoyment deferred. From a consideration of the will and of the surrounding circumstances or from a consideration of the will alone it is apparent that the primary purposes of the testator was to provide for these charitable bequests. The situation and circumstances of the husband and wife and of his interest in said charities before the will and codicil were executed, at the time of the execution of same and after their execution to the time of his death demonstrate that the testator had no expectation that his wife either needed to or would desire to invade the corpus of the estate at all; and after his death the widow never in the slightest degree invaded or expressd any wish to invade any of the principal or corpus of her husband's estate. In fact, she entered into an agreement recognizing that she had no authority. Moreover, the Superior Court of the State of Washington by decree of distribution and by an order holding the values of the bequests not taxable by the state because charitable, decreed that under the terms of the will she had no power to invade the corpus. Such decision of the Superior Court was pursuant to the widow's understanding of her rights under the will and while such decision that she had no right to invade the corpus deprived the State of Washington of more than $30,000 inheritance taxes, the state did not appeal from such decision. [69]

In providing that the widow is not to be limited

in her expenditures or required to make an accounting thereof, the testator impliedly expressed full confidence in her integrity, and his wife's ability and bestowed upon her the same independence and freedom from others that they had both enjoyed during his lifetime and wished to free his invalid wife during her short expectancy in the event she should survive her husband at all, from being under the fear that she would be interfered with as to such expenditures as she might make of income and from the fear that she would be required to make an accounting. The estate of the widow is a life estate, and the widow, while not required to account for her expenditures of the income of the life estate, would not be permited to wrongfully invade the corpus. The testator used the words "then remainder" with the idea that the then remainder would represent the corpus plus a portion of the unexpended income, rather than represent merely the substantially diminished corpus. There was no reason for any spendthrift precaution as to the widow.

Done in open Court this 15th day of February, 1943.

LLOYD L. BLACK
Judge. [69a]

And from the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. That the Court has jurisdiction of the subject matter of this action and of the parties thereto.

2. That the value of the bequests for charitable purposes were capable of definite ascertainment at the time of the death of the decedent.

3. That the plaintiff was entitled to deduct upon the estate tax return of decedent the following, as charitable bequests:

a. The value of the remainder interest of the Board of Conference Claimants, Inc. of the Pacific Annual Conference of the Methodist Episcopal Church in a bequest of $12,500, such value amounting to $3726.88.

b. The value of the remainder interest of the Baker-Boyer National Bank, as trustee for charitable purposes declared in the will of decedent, in the bequest of $30,000, such value amounting to $16,728.30.

c. The value of the remainder interest of the Baker-Boyer National Bank, as trustee for charitable purposes declared in the will of decedent, in the residue of the estate, such value amounting to $150,455.18.

3. That the plaintiff is entitled to judgment as follows:

(a) Against defendant, Thor W. Henricksen, in the sum of $8407.92, with interest thereon as provided by law from the 1st day of November, 1939; and in the further sum of $14,783.82 with interest thereon as provided by law from the 9th day of January, 1940:

(b) Against defendant, Clark Squire, in the sum of $1165.00 with interest thereon as provided by law from the 24th day of March, 1941;

4. That said judgment should contain a certificate of probable cause. [70]

5. That plaintiff should recover its costs herein.

Done in Open Court this 15th day of February, 1943.

LLOYD L. BLACK
Judge

Presented by:

BURNS POE
CAMERON SHERWOOD
MARVIN EVANS
ELIZABETH SHACKLEFORD
Attorneys for Plaintiff.

Receipt is hereby acknowledged this 21st day of January, 1943, of copy of the foregoing Findings of Fact and Conclusions of Law, proposed by plaintiff.

J. CHARLES DENNIS
United States District Attorney, Attorney for Defendants.

To all of which findings and conclusions defendants except and said exception is hereby allowed.

2/15/43.

LLOYD L. BLACK
Judge

[Endorsed]: Filed Feb. 15, 1943. [71]

United States District Court, Western District of Washington, Southern Division

BAKER-BOYER NATIONAL BANK, a corporation, executor of the Estate of GEORGE T. WELCH, deceased,

Plaintiff,

vs.

THOR W. HENRICKSON, formerly Acting Collector of Internal Revenue for the District of Washington; and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Defendants.

JUDGMENT

This matter coming on regularly to be heard on the third day of February, 1942, before the undersigned, sitting without a jury, pursuant to stipulation of the parties herein, waiving trial by jury, and the plaintiff and defendants having offered their evidence and having rested, and the Court having heard the arguments of counsel, and having made and filed herein Findings of Fact and Conclusions of Law in favor of the plaintiff and against defendants, and being fully advised in the premises, now, on motion of the plaintiff, it is hereby,

Ordered, Adjudged and Decreed, That plaintiff do have and recover of and from the defendant, Thor W. Henricksen, the sum of $8407.92 with interest thereon as provided by law from the first

day of November, 1939; and in the further sum of $14,783.82 with interest thereon as provided by law from the 9th day of January, 1940; and that the plaintiff do have and recover of and from the defendant, Clark Squire, the sum of $1165.00 with interest thereon as provided by law from the 24th day of March, 1941.

It Is Further Ordered, That plaintiff do have and recover [72] of and from the defendants its taxable costs and disbursements, to be taxed by the Clerk of this Court.

It Is Further Ordered, That no execution issue hereon.

And the Court does further determine and certify that the defendants as Collectors of Internal Revenue had probable cause for their actions in collecting from the Plaintiff the amounts for which the foregoing Judgment is rendered.

Done in open Court this 15th day of February, 1943.

LLOYD L. BLACK
Judge.

Presented by:

BURNS POE
MARVIN EVANS
CAMERON SHERWOOD
ELIZABETH SHACKLEFORD
Attorneys for Plaintiff.

Receipt is hereby acknowledged this 21st day of January, 1943, by the undersigned Attorney for defendants of a copy of the foregoing Judgment proposed by the Plaintiff.

J. CHARLES DENNIS
United States District
Attorney
Attorney for Defendants.

[Endorsed]: Filed February, 15, 1943. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Thor W. Henricksen, formerly Acting Collector of Internal Revenue for the District of Washington, and Clark Squire, Collector of Internal Revenue for the District of Washington, defendants above-named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on February 15, 1943.

J. CHAS DENNIS
United States Attorney.
HARRY SAGER
Assistant United States
Attorney.
THOMAS R. WINTER
Special Assistant to the Chief
Counsel, Bureau of Internal
Revenue.

Copy of Notice of Appeal mailed to Burns Poe, attorney for Plaintiff this 16th day of March, 1943.

E. REDMAYNE,
Dep. Clerk

[Endorsed]: Filed Mar. 16, 1943. [74]

[Title of District Court and Cause.]

ORDER RE EXHIBITS

Upon application of one of the attorneys for defendants and appellants herein and good cause appearing therefor, it is hereby

Ordered that all original exhibits in this cause be transmitted to the United States Circuit Court of Appeals, Ninth Circuit, in connection with the appeal of this case.

Dated this 29th day of March, 1943.

JOHN C. BOWEN
United States District Judge

Presented by
Harry Sager
Assistant United States Attorney.

[Endorsed]: Filed Mar 29, 1943. [75]

[Title of District Court and Cause.]

STIPULATION FOR RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

It is hereby stipulated by and between the defendants and the plaintiff, through their respective attorneys, that the record in this case to be contained in the record on appeal shall consist of the following:

1. Complaint and exhibits attached thereto, filed August 19, 1941.
2. Answer, filed November 25, 1941.
3. Stipulation, dated and filed February 3, 1942.
4. Court's Memorandum Opinion, dated and filed September 29, 1942.
5. Findings of Fact and Conclusions of Law, dated and filed February 15, 1943.
6. Judgment, dated and filed February 15, 1943.
7. Notice of Appeal, filed March 16, 1943.
8. Transcript of Proceedings as prepared by Mary White Bible, Court Reporter.
9. All original exhibits to be transmitted to the Circuit Court to be available to the Court for [76] inspection without printing, for the reason that some of these exhibits are duplicates of the copies attached to the complaint while others are photographs, photostat copies of records not of a printable character, are voluminous and contain many provisions not material.

10. Order re exhibits.
11. This Stipulation.

J. CHAS. DENNIS
United States Attorney.
HARRY SAGER
Assistant United States Attorney.
THOMAS R. WINTER
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.
Attorneys for Defendants.

BURNS POE
MARVIN EVANS
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 29, 1943. [77]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Judson W. Shorett, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify and return that the foregoing Transcript of the Record on Appeal, consisting of pages numbered 1 to 77, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause 267, Baker-Boyer National Bank, a corporation, Executor of the Estate of George T. Welch, deceased, Plaintiff and Appellee, vs. Thor W. Henricksen, formerly acting Collector

of Internal Revenue for the District of Washington, and Clark Squire, Collector of Internal Revenue for the District of Washington, Defendants and Appellants, as required by the Stipulation for Designation of Record on Appeal, (except Item 8 of said Stipulation, namely, Tranccript of Proceedings, the original of which is transmitted herewith), on file and of record in my office at Tacoma, Washington, the same constituting the Transcript of the Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit. [78]

I do further certify that the original exhibits, numbered as follows: Plaintiff's Exhibits Nos. 1 to 10, inclusive, and also Plaintiff's Exhibits "A" to "M", inclusive, being a part of the Stipulation filed under date of February 3, 1942 (See page 4 of the original Transcript of Proceedings), and Defendants' Exhibits "A" and "B", are transmitted herewith pursuant to order of the District Court herein.

Original Stipulation for Designation of the Record for Printing in the Circuit Court is also transmitted herewith.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred on behalf of the Defendants-Appellants herein in the preparation and certification of this Transcript of the Record on Appeal to the United States Circuit Court of Appeals for Ninth Circuit, to-wit:

Appeal fee	$ 5.00
Clerk's fees for comparing and preparing aforesaid record	10.80
Clerk's certificate	.50
	$16.30

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, State of Washington, this 20th day of April, 1943.

[Seal] JUDSON W. SHORETT,
Clerk
By E. REDMAYNE
Deputy [79]

[Title of District Court and Cause.]

TESTIMONY

Be It Remembered, the above-entitled action came on regularly for trial, on this the 3d day of February, 1942, before the Honorable Lloyd L. Black, sitting in the above-entitled Court, in Tacoma, Washington;

The plaintiff was represented by its Counsel Burns Poe, Esq., Attorney-at-Law, of Tacoma, Washington; and Cameron Sherwood and Marvin Evans, Esqs., of Walla Walla, Washington; and

The defendants were represented by their Counsel, Thomas R. Winter, Esq., Special Assistant to the Chief Counsel, Bureau of Internal Revenue, of

Seattle, Washington; Whereupon, the following proceedings were had:—[2*]

The Court: In the matter of Baker-Boyer National Bank versus Thor W. Henricksen and Clark Squire, in their official capacities, and as more specifically set forth in the title of the Cause, are the parties ready?

Mr. Poe: Your Honor, I would like to move at this time that Mr. Cameron Sherwood, of Walla Walla, be associated with me.

The Court: He will be associated with you and the record may so show.

Mr. Poe: At this time, we would like to offer the stipulation entered into between Counsel for the Government and the Attorneys for the plaintiff and herewith are the exhibits attached to the stipulation, in which most all of the facts, except Paragraph VII, which involves the interpretation of the will, are stipulated.

Mr. Winter: We haven't attached the exhibits to the written stipulation, itself, because they are not quite susceptible to attachement.

The Court: They are referred to?

Mr. Winter: Yes and we will leave them in the one folder, if that will be satisfactory?

The Court: What is the date of the stipulation?

Mr. Winter: It is dated today—if we dated it. Each and every one of the exhibits are referred to in the stipulation.

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* Page numbering appearing at foot of page of original Reporter's Transcript.

The Court: What is the date of the stipulation?

Mr. Poe: We will date it today.

Mr. Winter: February 3d, 1942. [3]

The Court: Do I understand this stiplation is offered in evidence?

Mr. Poe: It is.

The Court: The stipulation, with the exhibits referred to and identified by the stipulation, is admitted in evidence.

The stipulation and exhibits last above referred to, admitted in evidence and made a part of the record herein.

[Printer's Note: The Stipulation of Facts referred to is set out at page 52 of this printed record. Exhibits A, B, C, D, E, F, are set out in full in the complaint, at pages 9 to 49 of this printed record. Exhibits H, I, J, K, L, N, are reproduced below in full.]

EXHIBIT "H"

In the Superior Court of the State of Washington
In and for the County of Walla Walla

No. 26994

In the Matter of the Estate

of

GEORGE T. WELCH, Deceased Baker-Boyer National Bank, a corporation, as Executor and Trustee,

Petitioner

vs.

STATE OF WASHINGTON, Inheritance Tax and Escheat Division

Respondent

ORDER

This Matter coming on regularly to be heard before the undersigned and it appearing to the court that a controversy has arisen between the executor and trustee on the one hand and the Supervisor of the Inheritance and Escheat Division on the other hand, and the court having heard the arguments of counsel, and it further appearing to the court that the valuation of the total community estate should be the sum of $454,988.99 notwithstanding the appraisement of the appraisers on file herein, and that the State of Washington is entitled to the payment of $3.16, with interest at the rate of eight percent per annum from the date of the

death of decedent until paid; and the court having concluded that the State of Washington is not entitled to assess inheritance taxes against the estate due to the fact that the charitable trusts created by the will of decedent above named were not limited to use in the State of Washington, and the court being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed: that the State of Washington is entitled to receive as additional inheritance tax the sum of $3.16 with interest thereon from the 15th day of April, 1937 until paid, and the executor and trustee herein having raised the question that he is entitled to instructions from the court directing as to the fund or interest chargeable under the laws of the State of Washington and the terms of said will of the decedent and the decree of distribution heretofore entered herein, the court hereby orders, adjudges and decrees and construes the said will and decree of distribution:

(1) That under the words, terms and provisions of the said will, admitted to probate herein and made a part hereof by reference, the widow of the decedent, Carrie Welch, is entitled to receive from the decedent's half of the community property distributed to the trustee by the decree of distribution on file herein; that under the words, terms and provisions of said will, the said widow Carrie Welch, received only a life estate with a vested remainder over to the remaindermen therein mentioned, and subject to the trusts therein created.

(2) That under the words, terms and provisions

of said will the said widow Carrie Welch has no power to invade the corpus of said estate, but, during her lifetime, is entitled only to the net income above mentioned.

(3) That the remaindermen mentioned in said will inherited vested remainders, subject to the trust therein created.

(4) That the trustee shall not permit the corpus of the said estate to be invaded by the said Carrie Welch, but shall at all times manage and control said property in accordance with the terms of said trust with the powers therein given to it as trustees.

(5) That the trustee herein be and is hereby ordered and directed to pay the inheritance tax provided for out of corpus of the estate.

Done in open court this 29th day of March, 1940.

TIMOTHY A. PAUL,
Judge.

Presented by:

BURNS POE & MARVIN EVANS
Attorney for Petitioner

O.K. as to Form:

JOHN M. BOYLE, Jr.
Attorney for Supervisor

[Endorsed]: Filed March 29, 1940.

EXHIBIT "I"

In the Superior Court of the State of Washington,
In and for Walla Walla County.

No. 26994

In the Matter of the Estate

of

GEORGE T. WELCH, Deceased

FINAL ACCOUNT AND REPORT AND PETITION FOR DISTRIBUTION

Comes now the Baker-Boyer National Bank, of Walla Walla, Washington, as Executor of the estate of the above named George T. Welch, deceased, and presents and files herewith this its Final Account and Report and Petition for Distribution in manner following:

I.

That prior hereto and on the 20th day of April, 1937, it was by an Order of this Court duly appointed Executor of the Last Will and Testament of decedent, whereupon it duly qualified as such Executor and on said date Letters Testamentary were duly issued to it, and from thencehitherto it has continued to administer upon decedent's estate and is now the duly appointed, qualified and acting Executor thereof.

II.

That Notice to Creditors in the matter of said estate was duly published on the 21st day of April, 1937; that said Notice to Creditors was duly pub-

Exhibit "I"—(Continued)

lished for the time and in the manner required by law as is evidenced by the proof of publication thereof now on file with the Clerk of this Court, reference thereto being hereto made, as much so as if set forth herein verbatim.

III.

That the time for serving and filing of claims against said estate expired on the 21st day of October, 1937, and that within the time so limited for serving and filing of claims against the estate of decedent the following claims were duly served and filed with the Clerk of Court and thereafter presented to said Executor and allowed by it and likewise allowed and approved by the Court, to-wit:

Mrs. Bessie Tweedy for professional services as nurse	$ 18.00
Agnes Newhouse, for professional services as nurse	30.00
MacMartin & Chamberlain, Inc., Undertakers	552.50
Mrs. Bessie Tweedy, for additional professional services as nurse	42.00
Jacky & Fiedler, Casket Spray and tax	10.20
Tillie Mullen, for labor	20.00
Depping's Dairy, milk and cream	9.67
Drs. Lyman & Whitney, for professional services during last illness	217.50
Walla Walla Farm Bureau, alfalfa seed	51.00
E. E. Reever, chopped hay	19.60
Total	$ 970.47

IV.

That said estate comprising the community estate of decedent and Carrie Welch, his surviving spouse,

Exhibit "I"—(Continued)

has heretofore been duly inventoried and appraised in the total personal sum of $452,607.95, as is evidenced by the Inventories and Appraisements thereof now on file with the Clerk of this Court, and by reference made a part hereof, as much so as if set forth herein verbatim for a particular description of said community real and personal estate.

V.

That attached hereto and marked Exhibit "A" is an itemized Report of cash receipts and disbursements on account of principal from April 21, 1937, to January 17, 1938, and likewise is attached hereto and marked Exhibit "B" is an itemized Report of cash receipts and disbursements on account of income from April 21, 1937 to January 17, 1938, reference to said Exhibits "A" and "B" being hereto made and to comprise a part hereof as much so as if set forth herein verbatim.

VI.

That attached hereto and marked Exhibit "C" is an itemized Report of cash receipts and disbursements on account of principal and income from January 17, 1938 to March 25, 1938, and by reference made a part hereof as much so as if set forth herein verbatim.

VII.

That attached hereto and marked Exhibit "D" and by reference made a part hereof as much so as if fully set forth herein verbatim, is a Stipulation

Exhibit "I"—(Continued)

bearing date the 7th day of April, 1938, made, executed and acknowledged between the said Baker-Boyer National Bank, of Walla Walla, Washington, in its present capacity as such Executor of the estate of decedent and likewise as residuary Trustee of decedent's estate, for the uses and purposes set forth in the Last Will and Testament and Codicil thereto of decedent on the one part and by Carrie Welch, the surviving spouse of decedent on the other part, wherein and whereby a partition and division of the community estate, real and personal, of decedent and the said Carrie Welch have been mutually agreed upon as an equitable distribution of the residue of said community estate therein particularly described, and/or referred to, which said Stipulation also includes decedent's community undivided one-half interest in the real estate specifically described on pages 12 and 13 of said Stipulation given and devised unto his son, Fred B. Welch, subject, however, to the life estate therein unto his mother, the said Carrie Welch, setting forth the real estate and personal property to be partitioned and distributed to the said Carrie Welch and the real estate and personal property to be distributed to the Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as Trustee aforesaid, and decedent's community undivided one-half interest in the real estate to be distributed unto the said Fred B. Welch, subject to the life estate of the said Carrie Welch therein.

Exhibit "I"—(Continued)

VIII.

That the total amount of real estate and personal property stipulated to be set off to the said Carrie Welch, other than such personal property appraised at nil, is in the aggregate sum of $174,974.35; that the total amount of real estate and personal property stipulated to be set off to the said Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as Trustee aforesaid, other than such personal property appraised at nil, is in the aggregate sum of $189,077.40.

IX.

That on March 25th, 1938, the aggregate of the community cash on hand belonging to the principal or corpus of said community estate is in the sum of $37621.54 in checking acct. and $31834.43 in the savings acct.

X.

That the following community personal property shown in the original Inventory and Appraisement of said estate, to-wit:

Transamerica Corporation Capital Stock Certificates

Certificate #SF/E	71827—100	shares
"	71828—100	shares
"	71829—100	shares
"	71830—100	
#SF/D	76189— 10	shares
Total	410	shares

Appraised at $6,508.75

Bancamerica-Blair Corporation Capital Stock Certificates SFF79053 8 shares,

Appraised at 91.00

Exhibit "I"—(Continued)

is still on hand and undivided, but the present market value of all of said stock is less than the appraised valuations thereof, and in addition thereto there has come into the possession of said community estate during the administration thereof the following personal property, to-wit:

Bank of America Capital Stock Certificate #A1972 41 shares.

(Received as distribution on Transamerica Stock).

XI.

That the following are the names of all the heirs at law of decedent, and each of them competent and of the age of majority, to-wit: Carrie Welch, the surviving spouse of decedent, residing at Walla Walla, Washington, Fred B. Welch, a son of decedent, residing in Walla Walla County, Washington, and George B. Allen, a grandson of decedent, residing at Seattle, Washington.

XII.

That the following are the names of all the legatees and devisees named and provided for in the Last Will and Testament of decedent, to-wit: The said Carrie Welch, the surviving spouse, residing at Walla Walla, Washington, the said Fred B. Welch, a son, residing in Walla Walla County, Washington, the said George B. Allen, a grandson, residing at Seattle, Washington, Tena Haas, formerly Tena Zuest, residing at Walla Walla, Washington, Mrs. Clara Pitt, residing at Oakland, California, Board of Confer-

Exhibit "I"—(Continued)

ence Claimants, Inc. of the Pacific Northwest Annual Conference, Methodist Episcopal Church, having its offices in Seattle, Washington, and the Baker-Boyer National Bank, of Walla Walla, Washington, in trust, for the uses and purposes set forth in said Last Will and Testament and Codicil thereto, reference in respect thereto being hereto made and to constitute a part hereof, as much so as if set forth herein verbatim.

XIII.

That the cash bequests of $500.00 each unto the aforesaid Tena Haas, formerly Tena Zuest, and Mrs. Clara Pitt have been fully paid and due receipts taken therefor.

XIV.

That prior hereto the said Carrie Welch has caused to be filed with the Clerk of this Court her Petition praying that there be set off to her personal property of the value of $3000.00 belonging to the community estate of decedent and herself be awarded and set off to her as such surviving spouse, and the hearing on her Petition has been set for Monday, the 11th day of April, 1938, and if the prayer of her Petition is granted by order of Court she will be entitled to have distributed unto her such personal property in said sum.

XV.

That said Executor has paid the Federal Estate Tax as computed by it in the sum of $146.50, and likewise has paid the State Inheritance Tax as computed by it in the sum of $685.51, but as yet no

Exhibit "I"—(Continued)

final audit of said Federal Estate Tax and said State Inheritance Tax has been made but acknowledgments of the payment of said respective amounts have been received from the Federal Treasury Department and from the Inheritance Tax and Escheat Division of the State of Washington. That the respective taxes when finally determined are a direct charge only against decedent's interest in said community estate.

XVI.

That $5500.00 is a reasonable compensation to be allowed said Executor for its services herein, and that $5500.00 is a reasonable attorney's fee to be allowed Marvin Evans for legal services rendered by him herein, and said respective fees are a charge against the entire community estate.

XVII.

That while the said Baker-Boyer National Bank, of Walla Walla, Washington, in its present capacity as such Executor and as such Trustee aforesaid, and the said Carrie Welch have stipulated the manner of the partition and distribution of that portion of said community estate affected thereby to be distributed to them respectively, said Executor, nevertheless, recommends that before the same is partitioned and set off to them by Decree of Distribution, the Court appoint at least three disinterested witnesses for the purpose of viewing such property and give their testimony at the final hearing herein, or at any adjourned hearing hereon, pursuant to

Exhibit "I"—(Continued)

Section 1533 of Remington's Revised Statutes of Washington in respect thereto.

XVIII.

That other than the final determination of the Federal Estate Tax and the State Inheritance Tax in the matter of the estate of decedent, said estate has been fully administered upon and is ready to be settled.

Wherefore, said Executor prays as follows:

1. That a time and place be fixed by an order of this Court for a hearing upon said Final Account and Report, and at the time and place fixed for said hearing, or at any adjourned hearing hereon, said Final Account and Report be allowed, approved and settled.

2. That there be allowed said Executor as its compensation herein the sum of $5500.00, and that there be allowed Marvin Evans as attorney fees herein the sum of $5500.00.

3. That there be distributed unto the said Carrie Welch an undivided one-half interest in the real estate described on pages 12 and 13 of said Stipulation and a life estate in the remaining undivided one-half thereof, and unto said Fred B. Welch said remaining undivided one-half thereof, subject to the life estate of his mother, the said Carrie Welch.

4. That three disinterested witnesses be appointed by this Court for the purpose of viewing the residue of said community estate and give their testimony before this Court in respect to the segregation, par-

Exhibit "I"—(Continued)

tition and distribution thereof to the said Carrie Welch and to the said Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as Trustee aforesaid.

5. That there be distributed to the said Carrie Welch her proportion of said community estate in the manner set forth in said Stipulation, and that there be distributed to the said Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as Trustee for each and every of the purposes set forth in decedent's said Last Will and Testament and Codicil thereto and said Stipulation the residue of said community estate pursuant to the terms of said Stipulation.

6. That said Executor continue in its capacity as such until the final determination of the Federal Estate Tax in the matter of said estate.

7. For such other and further order in the premises as to the Court may seem just and proper.

(Signed) MARVIN EVANS
Attorney for Estate

State of Washington
County of Walla Walla—ss.

N. A. Davis being first duly sworn on oath, deposes and says: That he is the Vice President of the Baker-Boyer National Bank, of Walla Walla, Washington, the Executor herein, and makes this verification for and on behalf of said Executor; that he has read the foregoing Final Account and Report

Exhibit "I"—(Continued)

and Petition for Distribution, knows the contents thereof and that the facts therein stated are true as he verily believes.

(Signed) N. A. DAVIS

Subscribed and sworn to before me this 7 day of April, 1938.

(Signed) MARVIN EVANS

Notary Public for Washington Residing at Walla Walla, Wash.

[Endorsed]: Filed Apr. 8, 1938.

EXHIBIT "J"

In the Superior Court of the State of Washington
In and for Walla Walla County

No. 26994

In the Matter of the Estate of

GEORGE T. WELCH, Deceased.

STIPULATION

Whereas, the undersigned, the Baker-Boyer National Bank, of Walla Walla, Washington, is the duly appointed, qualified and acting Executor of the estate of the above named George T. Welch, deceased, and likewise a residuary Trustee of his estate for the uses and purposes set forth in the Last Will and Testament and Codicil thereto of decedent, reference in respect thereto being hereto

Exhibit "J"—(Continued)

made and to constitute a part hereof, as much so as if set forth herein verbatim; and

Whereas, all the estate left by decedent comprised the community estate of himself and Carrie Welch, his surviving spouse, and upon his death one-half of said community estate goes to her, subject to the community debts and the expenses and charges of administration upon said community estate; and

Whereas, all claims against said estate and the cash bequests have been paid, including the Federal Estate Tax and State Inheritance Tax as computed by said Executor, and the estate of decedent is ready for settlement; and

Whereas, said Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as such Executor and Trustee, and the said Carrie Welch as such surviving spouse of decedent, have mutually agreed upon a mutual and equal distribution of the residue of said community estate, and after being fully advised of all their legal rights in respect thereto do hereby Stipulate and Agree upon a partition and division of said community estate between the respective parties hereto in manner following:

COMMUNITY REAL ESTATE

1. That there be distributed unto said Carrie Welch in her own separate right, the following described real estate situated in the County of Walla Walla, State of Washington, to-wit:

Exhibit "J"—(Continued)

Lot Twenty-three (23) of McAuliff's Addition to the City of Walla Walla, Washington, according to the official plat thereof of record in the office of the Auditor of said County of Walla Walla, excepting therefrom, however, the South five (5) feet of said Lot conveyed to the City of Walla Walla for the purpose of a public alley.

at the agreed valuation of $1050.00.

Also: Begining at a point in the Southerly line of Birch Street in the City of Walla Walla, Washington, which point is 140.65 feet Easterly, measured along said Southerly line of Birch Street from the point of its intersection with the Easterly line of Fourth Avenue South (formerly Fourth Street) in said City; thence North 60° 10′ East, along said Southerly line of Birch Street, a distance of 76.60 feet to a point which is South 60° 10′ West 80.25 feet from the Westerly line of Third Avenue South (formerly Third Street); thence South 26° 33′ East, parallel to said Westerly line of Third Avenue, a distance of 140.70 feet; thence South 60° 10′ West 69.75 feet; thence Northwesterly in a straight line 140.50 feet, more or less, to the point of beginning.

at the agreed valuation of $2000.00.

Also: The Southeast quarter (SE¼) of Section Twenty-five (25) in Township Twelve

Exhibit "J"—(Continued)

(12) North, of Range Thirty-five (35) East of the Willamette Meridian.

Containing 160 acres, according to the official plat of U. S. Government Survey.

Also: All of Section Thirty-six (36) in Township Twelve (12) North, of Range Thirty-five (35) East of the Willamette Meridian.

Containing 640 acres, according to the official plat of U. S. Government Survey.

Also: The fractional Northwest quarter (NW¼) of Section Five (5) in Township Eleven (11) North, of Range Thirty-six (36) East of the Willamette Meridian, containing 159.12 acres, according to the official plat of U. S. Government Survey.

Also: The fractional North half (N½) of Section Six (6) in Township Eleven (11) North, of Range Thirty-six (36) East of the Willamette Meridian.

Containing 307.89 acres, accordang to official plat of U. S. Government Survey.

Excepting therefrom, however, the right of way of the Northern Pacific Railway Company over and across the West half of the Northwest quarter of said Section 6.

Leaving a net acreage of 302.78 acres, more or less.

Also: The fractional South half (S½) of Section Thirty-one (31) in Township Twelve (12) North, of Range Thirty-six (36) East of the Willamette Meridian.

Exhibit "J"—(Continued)

Containing 308.35 acres, according to the official plat of U. S. Government Survey.

Excepting therefrom the right of way of the Northern Pacific Railway Company over and across said premises.

Leaving a net acreage of 293.78 acres, more or less,

at the total agreed valuation of $89,440.00.

Also: The West half (W½) of Section Twenty-eight (28) in Township Twelve (12) North, of Range Thirty-six (36) East of the Willamette Meridian.

Containing 320 acres, according to the official plat of U. S. Government Survey.

The East half (E½) of Section Twenty-nine (29) in Township Twelve (12) North, of Range Thirty-six (36) East of the Willamette Meridian.

Containing 320 acres, according to the official plat of U. S. Government Survey.

Excepting therefrom, however, the following described tract, to-wit:

Beginning at a point which is 30 feet East and 33 feet South of the Northwest corner of the Southeast quarter of said Section 29, and running thence South 12½ rods; thence East 12½ rods; thence North 12½ rods, and thence West 12½ rods to the point of beginning. Containing 1 acre, more or less.

Also excepting the right of way of the North-

Exhibit "J"—(Continued)

ern Pacific Railway Company over and across the West half of Northeast quarter of said Section 29,

at the total agreed valuation of $35,145.00.

Also: Beginning at a point on the westerly line of Catherine Street in the City of Walla Walla, Washington, which point is 180.00 feet Southerly, measured along said Westerly line of Catherine Street, from the point of intersection of same with the Southerly line of Birch Street in said City; thence South 29° 50′ East along said westerly line of Catherine Street, a distance of 60.00 feet; thence South 60° 10′ West 123 feet and 8 inches; thence North 29° 50′ West 60.00 feet; thence North 60° 10′ East 123 feet and 8 inches to the point of beginning.

Being the Southerly 60 feet of Lot One (1) in Block Twenty-eight (28) of Roberts' Addition to the City of Walla Walla, according to the official plat thereof,

at the agreed valuation of $5,500.00.

Also the following described real estate situated in the County of King, State of Washington, to-wit:

Lot Three (3) in Block Two (2) Highlands Addition to the City of Seattle, according to the official plat and survey thereof now on file and of record in the office of the County Auditor of said King County, Washington,

Exhibit "J"—(Continued)

at the agreed valuation of $2500.00.

Grand total agreed valuation of real estate $135,635.00.

2. That there be distributed unto the Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as Trustee aforesaid of the estate of decedent in its own separate right, the following described real estate, situated in the County of Walla Walla, State of Washington, to-wit:

The Northwest Quarter of the Northeast Quarter, the North Half of the Northwest Quarter and the Southwest Quarter of the Northwest Quarter of Section Two (2), the North Half of Section Three (3), the East Half and the Northwest Quarter of Section Nine (9), the North Half of Section Ten (10), and Section Eleven (11), all in Township Eleven (11), North of Range Thirty-five (35) East of Willamette Meridian, containing 1925.04 acres, more or less.

And in addition thereto the Northeast Quarter of Section Sixteen (16) in the aforesaid Township and Range held under lease from the State of Washington and known as the State School Land,

at the agreed valuation of $76,652.00.

Also: The South half of the Southwest quarter (S½SW¼) of Section One (1) in Township Six (6) North, of Range Thirty-five (35) East of the Willamette Meridian.

Exhibit "J"—(Continued)

Excepting therefrom the right of way of State Road No. 3 (Inland Empire Highway) along the North side of said premises and County Road.

Containing 77.60 acres, more or less.

Also, The Southwest quarter of the Southeast quarter of Section One (1) in Township Six (6) North, of Range Thirty-five (35) East of the Willamette Meridian.

Excepting therefrom the right of way of State Road No. 3 (Inland Empire Highway) along the North side of said premises.

Containing 39.40 acres, more or less.

Also: The Southeast quarter of the Southeast quarter (SE¼SE¼) of Section Two (2) in Township Six (6) North, of Range Thirty-five (35) East of the Willamette Meridian.

Excepting therefrom the right of way of State Road No. 3 (Inland Empire Highway) along the North side of said premises.

Containing 39.10 acres, more or less.

Also: The West half of the Northwest quarter (S½NW¼) of Section Twelve (12) in Township Six (6) North, of Range Thirty-five (35) East of the Willamette Meridian. Excepting County road along West side.

Containing 78.20 acres, more or less,

at the total agreed valuation of $16,958.16.

Grand total agreed valuation of real estate $93,610.16.

Exhibit "J"—(Continued)

COMMUNITY PERSONAL ESTATE

3. That there be distributed unto the said Carrie Welch the following described personal property, to-wit:

Balance against one-third share in 900 acres 1937 wheat crop valued at	$ 1,186.50
Walla Walla Canning Company first mortgage Leasehold 6% Bonds of 5/1/46, Numbered 3, 4 and 5 at $1000.00 each, valued at	3,000.00
Northwest Toll Bridge Co. 5% Debenture of 1/1/46 ($600.00 P. V.) Bond #DC337, valued at	180.00
Household goods and personal effects, valued at	757.10
Automobile, valued at	1,000.00
Overdraft on 1937 income	559.80
Stocks:	
Walla Walla Canning Company Capital Stock (non par)	
Certificate # 75—2 shares	
" #186—2 shares	
" #304—1 share	
Total valuation	375.00
Walla Walla Canning Company Preferred Stock (100 par) 5 shares of Certificate #151, valued at	500.00
Milton Box Company Capital Stock (100 par) 12½ shares in Certificate #138, valued at	1,250.00
Walla Walla Farmers Agency Capital Stock (100 par) Certificate #70—20 shares	
" #98— 4 shares valued at	960.00

Exhibit "J"—(Continued)

Walla Walla Farmers Exchange Capital Stock ($10.00 par)	
Certificate #150—15 shares	
" #285—23 shares	
" #286—57 shares	
" #287—20 shares	
" #293—46 shares	
" #294—57 shares	
Total.....218 shares	
Valued at.....	218.00
Gas Ice Corporation common stock (non par)	
Certificate # 51—250 shares	
75 shares in	
Certificate #171, total 325 shares,	
Valued at.....	325.00
Klickitat Mineral Springs, Inc. Capital Stock (non par)	
Certificate #24—250 shares,	
Valued at.....$	125.00
Tum-a-Lum Lumber Company 4% Preferred Stock (100 par)	
50 shares in Certificate #18	
Valued at.....	4,000.00
Consolidated Securities Company Common Stock (non par) 2½ shares in Certificate #116	
Valued at.....	62.50
Walla Walla Grain Growers 7½ shares P.V. $30.00 per share,	
Valued at.....	7.50
Consolidated Securities Company Participation Certificates	
40% remaining unpaid on Certificate	
Face $1236.07, 40% remaining unpaid on	
Certificate Face $12,891.40,	
Total valuation.....	2,542.95
Mortgage Loans:	
Friederich and Mamie Schmidt,	
Face originally $2500.00,	
dated 7/15/25 due 7/15/35, interest 6%	
Valued at.....	600.00

Exhibit "J"—(Continued)

Oliver T. Cornwell, et al.
Face $10,500.00
Dated 12/1/33 due 12/1/38, interest 6% annually,
Valued at..... 10,500.00

Jacky & Fiedler, Inc.
Face $5500.00
Dated 6/12/35 due 6/12/40, interest 7% semi-annually,
Valued at..... 5,500.00

Notes:

Milton Box Company
One note $4000.00 dated 5/9/34 due 11/9/34, Int. 8%
Valued at..... 4,000.00

C. H. & C. B. Harris note,
Face 1500.00, dated 5/1/33 due 5/1/42
interest 5%
Valued at..... 1,500.00

Elizabeth Bellingham
Face $1000.00, dated 2/14/20 due 2/14/21
Int. 6%, on which substantial amounts of principal and interest have been paid,
Valued at..... 190.00

Additional Stock:

Northwest Toll Bridge Co. Capital Stock (non par) 10 shares in Certificate No. 238.

Wauna Toll Bridge Co. Preferred Stock (100 par) 53 shares in Certificate No. 68.

Wauna Toll Bridge Co. Common Stock (non par)

Certificate No. 103—50 shares
" No 356— 3 shares
23 shares in Certificate No. 351

Total 76 shares

Grand total agreed valuation of personal property ..... $ 39,339.35

4. That there be distributed unto the Baker-Boyer National Bank, of Walla Walla, Washing-

Exhibit "J"—(Continued)

ton, in its capacity as Trustee aforesaid of the estate of decedent in its own separate right, the following described personal property, to-wit:

Agreement in writing of date March 18, 1938, between the Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as Executor of the estate of George T. Welch, deceased, during the administration upon decedent's estate in court and subsequent thereto as Trustee of decedent's estate, and Carrie Welch, the surviving spouse of the said George T. Welch, deceased, to sell and convey to Guy Nelson and Hazel L. Nelson, his wife, the following described lands and premises, situated in the City and County of Walla Walla, State of Washington, to-wit:

Beginning at a point in the Southerly line of Birch Street in the City of Walla Walla, Washington, which point is 140.65 feet Easterly, measured along said Southerly line of Birch Street from the point of its intersection with the Easterly line of Fourth Avenue South (formerly Fourth Street) in said City; thence South 60° 10′ West, along said Southerly line of Birch Street, a distance of 82.65 feet to a point in a line drawn parallel to and distant 58.00 feet Easterly, measured at right angles, from said Easterly line of Fourth Avenue South; thence South 29° 50′ East, along said parallel line, a distance of 140.47 feet; thence North 60° 10′ East 69.57 feet; thence South 26° 33′ East 20.00 feet; thence North 60° 10′ East 12.00 feet; thence North 26° 33′ West 20.00 feet; thence Northwesterly in

Exhibit "J"—(Continued)

a straight line 140.50 feet, more or less, to the point of beginning;

Together with all the personal property therein contained, consisting chiefly of all carpets fitted and attached to floors and stairways, and one gas range in the residence upon the premises above described, on which there is remaining unpaid on the agreed purchase price therefor the sum of $3200.00, subject to the terms and conditions in said Agreement set forth, at the agreed valuation of $3200.00.

Bonds:

Federal Farm Mortgage Corporation 3% of 44/49 Registered $1300 P. V. Bond #4918J 1 at $1000. #6806F, #6807H, #6808J 3 at $100. at the agreed valuation of	$ 1,316.25
Walla Walla Funding Water Extension 4½% of 7/1/54 $10,000 P. V. Bonds #371 to #380, inclusive, 10 at $1000, at the agreed valuation of	10,400.00
Gardena Farms District #13 Walla Walla Co., 6% P. V. 5500 Series M. Bond #53 due 7/1/44 1 at $500. Series N Bond # 56, 57, 59, 60, 61, 62, 63, 64, due 7/1/45 8 at $500, Series O Bond 65, 70 due 7/1/46 2 at $500. at the agreed valuation of	5,500.00
Walla Walla Canning Company First Mortgage Leasehold 6% of 5/1/46 $2000.00 P. V. Bonds 6 and 7 at $1000.00. at the agreed valuation of	2,000.00
Northwest Toll Bridge Company 5% Debenture of 1/1/46 $600. P. V. Bond #DC338 at $600., at the agreed valuation of	180.00

Exhibit "J"—(Continued)

Participation Certificate:

National Bondholders Corporation Participation Certificate Mortgage, Guarantee, Series A-1 No. MGA 1 #700 to 709, 10 at $1000. Face Value $10,000. Paid on principal 41% at the agreed valuation of.....$ 2,500.00

National Bondholders Corporation Participation Certificate,
Central Funding Series B
CFB 531, 2442, 2443, 3 at $1000. Face $3000.
Paid on principal 45%,
at the agreed valuation of..... 780.00

National Bondholders Corporation Participation Certificate
Central Funding Series C
CFC 1855 to 1862, inclusive, 8 at $1000.
Face $8000.
Paid on Principal 45%,
at the agreed valuation of..... 2,080.00

National Bondholders Corporation Participation Certificate Central Funding Series D
CFD 1960, 1961 2 at $1000. Face $2000.
Paid on Principal 45%,
at the agreed valuation of..... 520.00

National Bondholders Corporation Participation Certificate Mortgage Bond Series E
MBE 58 1 at $500. Face,
MBE 522 to 524, inclusive,
MBE 582, 730, 731, 969,
MBE 1063, 1419, 1435, 1436 11 at $1000.
Face $11,500.
Paid on Principal 46%,
at the agreed valuation of..... 2,530.00

National Bondholders Corporation Participation Certificate,
Southern Securities Series A
SSNU4 1 at $500. Face $500.
Paid on Principal 55%,
at the agreed valuation of..... 85.00

Exhibit "J"—(Continued)

National Bondholders Corporation Participation Certificate
Investors Mortgage Series D
IMD 51, 52, 2 at $1000 Face $2000.
Paid on Principal 41%
at the agreed valuation of..... $ 340.00

National Bondholders Corporation Participation Certificate,
Union Mortgage Series G
UMG 419, 420, 421 3 at $1000 Face—$3000.
Paid on Principal 64%,
at the agreed valuation of..... 270.00

National Bondholders Corporation Participation Certificate, Central Funding Series A
CFA104,241, 2 at $500. Face CFA 1569 1 at $1000.—$2000.
Paid on principal 45%,
at the agreed valuation of..... 520.00

Walla Walla Canning Company Capital Stock (non par) Certificate #435—5 shares
at the agreed valuation of..... 375.00

Walla Walla Canning Company Preferred Stock (100 par) 5 shares in Certificate #151
at the agreed valuation of..... 500.00

Milton Box Company Capital Stock (100 par) 12½ shares in Certificate #138,
at the agreed valuation of..... 1,250.00

Walla Walla Farmers Exchange Capital Stock ($10.00 par)

Certificate # 18—100 shares
" #281—125 shares

Total..... 225 shares

at the agreed valuation of..... 225.00

Exhibit "J"—(Continued)

Walla Walla Farmers Agency Capital Stock ($100.00 par)

Certificate	#115—	2 shares
"	#116—	2 shares
"	#129—	4 shares
"	#139—	16 shares
Total		24 shares

at the agreed valuation of.....$ 960.00

Northwest Toll Bridge Co. Capital Stock (non par) 10 shares in Certificate No. 238.
Wauna Toll Bridge Co. Preferred Stock (100 par) 53 shares in Certificate No. 68.
Wauna Toll Bridge Co. Common Stock (non par) 77 shares in Certificate No. 351.
Gas Ice Corporation Common Stock (non par) 325 shares in Certificate #171,
at the agreed valuation of.....$ 325.00

Klickitat Mineral Springs Inc. Capital Stock (non par) Certificate #56 250 shares,
at the agreed valuation of.....$ 125.00

Tum-a-Lum Lumber Company 4% Preferred Stock (100 par) 50 shares in Certificate #18,
at the agreed valuation of.....$ 4,000.00

Consolidated Securities Company Common Stock (non par) 2½ shares in Certificate #116
at the agreed valuation of.....$ 62.50

Walla Walla Grain Growers
7½ shares, P. V. $30.00,
at the agreed valuation of.....$ 7.50

Consolidated Securities Company Participation Certificate, 40% remaining unpaid on Certificate Face $1236.07, 40% remaining unpaid on Certificate Face $12,891.40,
at the agreed valuation of.....$ 2,542.95

Exhibit "J"—(Continued)

Mortgage Loans:

Marvin Evans
Face $16,000.00, Interest 5%
Paid on principal $6000.00,
Dated 11/2/32 due 12/15/38
at the agreed valuation of..... $ 10,000.00

Cleve and Lucy B. Prather,
Face $750.00, Interest 6%
Dated 10/1/30 due 10/1/32
at the agreed valuation of..... 774.38

Notes:

Henry H. and Flora Moore Bennett,
Face $1000.00, Interest 7%
Paid on principal $2.50
Dated 10/9/37 due 10/9/38
at the agreed valuation of..... 997.50

J. T. Crawford,
Face $10,000.00, Interest 6%
Dated 11/14/32 due 11/14/37
at the agreed valuation of..... 10,000.00

Milton Box Company,
One note for $4000.00
Dated 5/9/34 due 11/9/34 Interest 8%
at the agreed valuation of..... 4,000.00

C. H. and C. B. Harris,
Face $2250.00, Interest 5%
Dated 5/1/33 due 5/1/41
at the agreed valuation of..... 2,250.00

W. W. Harvey
Face $12,000.00, Interest 5%
Dated 6/24/37 taken in lieu of lost or misplaced promissory note
at the agreed valuation of..... 2,222.16

Miscellaneous:

One-third interest in cattle on ranch rented to E. E. Reever,
at the agreed valuation of..... 125.00

Exhibit "J"—(Continued)

One-third-interest in hog on ranch rented to E. E. Reever, at the agreed valuation of	4.00
Naimy-Winget first Mtge. Bond, at the agreed valuation of	2,500.00
Glen A. Smith, R. E. Mtge. Loan, at the agreed valuation of	20,000.00
Grand Total agreed valuation of Personal Property	$ 95,467.24

State Line Telephone Co. Capital Stock (100 par) Certificate #72¼ share

5. Cash on hand at time of distribution belonging to the corpus of this estate to be divided equally after reserving sufficient therefrom for administration expenses and equalizing the total value of the property as shown by the agreed division pursuant to the terms of this Stipulation, with the understanding, however, that there shall be charged separately against the George T. Welch estate any sums paid or to be paid on account of State Inheritance or Federal Estate Taxes thereon.

6. The following described lands in Walla Walla County, State of Washington, to-wit:

Beginning at a point on the East line of Section 33, in Township 7 North, of Range 34 East of the Willamette Meridian, which is 10 chains North of the quarter corner on the East side of said Section 33; thence North on the East line of said Section 33 and the East line of Section 28, said Township and Range, to a point in the East line of said Section 28, which is 50 feet South of the center line

Exhibit "J"—(Continued)

of the main track of the Walla Walla and Columbia River Railroad (Oregon Railroad and Navigation Company) measured on a line drawn at right angles to said center line; thence Westerly on a line drawn parallel to and distant 50 feet Southerly from said center line of said Railroad, to a point in the North and South center line of said Section 28, thence South and on said center line of said Section 28 and the center line of Section 33 aforesaid, to a point in said center line of Section 33, which is 10 chains North of the center point of said Section 33, thence East 39.32 chains to the point of beginning.

Also: Beginning at a point in the North line of the Louis Dauney Donation Claim, which is 60 feet West of the point of intersection of said North line with the North and South center line of Section 28, Tp. 7 N. R. 34, E.W.M.; thence West 4.50 chains; thence South 14.95 chains; thence North 72° 20′ West 6.84 chains; thence South 7.42 chains to the Walla Walla River; thence following the meanderings of said River in a general Easterly direction, and along its North bank as follows:— N. 56° 29′ E. 2.07 chains; N. 83° 24′ E. 2.49 chains; thence S. 36° 54′ E. 1.50 chains; thence S. 10° 06′ E. 4.32 chains; thence S. 76° 12′ E. 1.19 chains; thence N. 20° 23′ E. 7.40 chains; thence N. 75° 13′ E. to a point on the North bank of said River which is 60 feet West of said North and South center line of Section 28, measured on a line at right angles there-

Exhibit "J"—(Continued)

to; thence North 18.35 chains to the point of beginning.

Together with all easements, rights of way, water and water rights thereunto belonging or appurtenant to the lands and premises above described.

Said Louis Dauney Donation Claim being Claim No. 38, according to the Official Plat thereof in the office of the Surveyor General of the United States and being parts of Sections 28, 29, 32 and 33 in Township seven (7) North, of Range thirty-four (34) East of the Willamette Meridian.

Excepting therefrom the right of way of the Oregon-Washington Railroad and Navigation Company, formerly Walla Walla and Columbia River Railroad Company, shall be distributed unto said Carrie Welch an undivided one-half thereof and a life estate in the remaining undivided one-half thereof and unto Fred B. Welch, son of said deceased, said remaining undivided one-half thereof, subject to the life estate of his mother, the said Carrie Welch.

7. Any property of the corpus of this estate, real or personal, for the distribution of which no provision has been made hereinbefore, shall be distributed in equal shares to the undersigned, Carie Welch and the Baker-Boyer National Bank, of Walla Walla, Washington, as Trustee aforesaid.

8. All the rents, issues and profits of and from all of the property of this estate accruing since the death of said George T. Welch and up to the time of entry of Decree of Distribution, less payments

Exhibit "J"—(Continued)

thereof heretofore made to said Carrie Welch, and also less general property taxes and other expenses properly payable and paid out of said income, shall be distributed to said Carrie Welch.

9. All of the rents, issues and profits of and from all cash and other property, real and personal, distributed pursuant to this Stipulation to said Baker-Boyer National Bank, as Trustee aforesaid, after deducting therefrom all charges and expenses properly payable therefrom, shall be by said Trustee paid over to said Carrie Welch during the remainder of her natural life, said payments to be made semi-annually or at shorter intervals when convenient and reasonable. It is understood that the compensation to be paid said Bank as such Trustee for its services herein shall be one-half of one per cent per annum of the value of said trust estate for all services incidental to the collection and distribution of such rents, issues and profits during the remainder of her natural life.

In Witness Whereof the said Baker-Boyer National Bank, of Walla Walla, Washington, as such Executor aforesaid and as such Trustee, as hereinbefore provided, by resolution of its Board of Directors, hath caused these presents to be subscribed by N. A. Davis, its Vice President, and by W. G. Shuham, its Cashier, and its corporate name and seal to be hereunto affixed in quadruplicate, and the said Carrie Welch has likewise hereunto set

Exhibit "J"—(Continued)

her hand and seal in quadruplicate this 7 day of April, 1938.

[Seal] BAKER-BOYER NATIONAL BANK OF WALLA WALLA, WASHINGTON

By N. A. DAVIS

[Seal] Its Vice President

Attest: W. G. SHUHAM

Its Cashier

As Executor of the Estate of George T. Welch, Deceased, and as such Trustee aforesaid.

[Seal] CARRIE WELCH

State of Washington
County of Walla Walla—ss.

On this 7 day of April, 1938, before the undersigned, a Notary Public in and for said County and State, personally appeared N. A. Davis and W. G. Shuham, to me known to be the Vice President and Cashier, respectively, of the Baker-Boyer National Bank, of Walla Walla, Washington, the corporation that executed the within and foregoing Stipulation as Executor of the estate of the above named George T. Welch, deceased, and as Trustee aforesaid, and they each acknowledged to me that they subscribed the within and foregoing Stipulation as such Vice President and Cashier, respectively, for and on behalf of said corporation, for the uses and purposes therein mentioned, and on oath stated that

Exhibit "J"—(Continued)

they were authorized to execute said Stipulation for and on behalf of said corporation, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first in this certificate above written.

MARVIN EVANS
Notary Public in and for the State of Washington, Residing at Walla Walla, Washington.

State of Washington
County of Walla Walla—ss.

On this day personally appeared before me Carrie Welch, to me known to be the individual described in and who executed the within and foregoing Stipulation, and acknowledged that she signed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 7th day of April, 1938.

JOHN F. WATSON
Notary Public in and for the State of Washington, Residing at Walla Walla, Washington.

EXHIBIT "K"

In the Superior Court of the State of Washington,
In and for Walla Walla County

No. 26994

In the Matter of the Estate of

GEORGE T. WELCH, Deceased

FINAL DECREE

Now on this 9th day of May, 1938, at the hour of two o'clock in the afternoon, coming on regularly for hearing in open court upon the Final Account and Report and Petition for Distribution now on file herein of the Baker-Boyer National Bank, of Walla Walla, Washington, as Executor of the estate of the above named George T. Welch, deceased, said Executor appearing by N. A. Davis, its Vice President, and by Marvin Evans, as its attorney herein, and Carrie Welch, the surviving spouse of decedent, appearing by John F. Watson, her attorney of record herein, and it appearing to the Court on due and sufficient proof and the Court does herein find that due and legal notice of the hearing upon said Final Account and Report and Petition for Distribution has heretofore been given by posting and by publication and as by law required and in full compliance with the Order of this Court heretofore made and entered herein on the 8th day of April, 1938, as is evidenced by the proof of posting and of publication of said notice now on file with the Clerk of this Court, and by

Exhibit "K"—(Continued.)

reference made a part hereof as much so as if set forth herein verbatim; that Notice to Creditors in the matter of said estate has heretofore been duly published for the time and in the manner required by law as is evidenced by the proof of publication of said Notice to Creditors now on file with the Clerk of this Court, and by reference made a part hereof as much so as if set forth herein verbatim; that the first publication of said Notice to Creditors was on the 21st day of April, 1937, and more than six months have elapsed since the first publication thereof.

That the time for serving and filing of claims against said estate has fully expired; that within the time so limited for the serving and filing of claims against the estate of decedent the following claims were duly served and filed with the Clerk of Court and thereafter presented to said Executor and allowed by it, and likewise allowed and approved by the Court, to-wit:

Mrs. Bessie Tweedy for professional services as nurse	$ 18.00
Agnes Newhouse, for professional services as nurse	30.00
MacMartin & Chamberlain, Inc., Undertakers	552.50
Mrs. Bessie Tweedy, for additional professional services as nurse	42.00
Jacky & Fiedler, Casket Spray and tax	10.20
Tillie Mullen, for labor	20.00
Depping's Dairy, milk and cream	9.67
Drs. Lyman & Whitney, for professional services during last illness	217.50
Walla Walla Farm Bureau, alfalfa seed	51.00
E. E. Reever, chopped hay	19.60
Total	$ 970.47

Exhibit "K"—(Continued.)

and that each of said claims have been fully paid and discharged.

That all the obligations owing by decedent at the time of his death, including the expenses of his last sickness and burial, have been fully paid.

That the estate of decedent, comprising the community estate of himself and his said surviving spouse, Carrie Welch, has been duly inventoried and appraised as is evidenced by the Inventory and Appraisement thereof now on file with the Clerk of this court, reference to said Inventory and Appraisement for a particular description of the real estate and personal property comprising said community estate being hereto referred to and to constitute a part hereof as much so as if set forth herein verbatim.

That said Final Account and Report is in all respects true and correct and the same should be allowed, approved and settled.

That subsequent to the filing of said Final Account and Report said Executor has necessarily expended the following sums which are a direct charge against said community estate, to-wit:

April 1, 1938, To Carrie Welch, monthly allowance	$ 300.00
Apr. 11, 1938, Amount allowed Carrie Welch as surviving spouse of decedent	3,000.00
Apr. 25, 1938, Publication of Notice of Final Hearing	6.42
May 2, 1938, To Carrie Welch, monthly allowance	300.00
May 3, 1938, Final Clerk's fee	5.00
Total	$3,611.42

Exhibit "K"—(Continued.)

That said Carrie Welch should be charged with that portion of said May, 1938 monthly allowance accruing subsequent to May 9 thereof.

That any collections made or expenses incurred on properties to be distributed subsequent to the date of the filing of the Final Account and Report herein shall be credited or charged to the party to whom such property is to be distributed pursuant to the terms of the hereinafter referred to Stipulation.

That attached to said Final Account and Report and Petition for Distribution and marked Exhibit "D" and made a part of said Final Account and Report, as much so as if fully set forth therein verbatim, is a Stipulation bearing date the 7th day of April, 1938, made, executed and acknowledged between the said Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as such Executor of the estate of decedent, and likewise as residuary Trustee of decedent's estate for the uses and purposes set forth in the Last Will and Testament and Codicil of decedent, and by Carrie Welch, the surviving spouse of decedent, in which said Stipulation the said Bank, as such Executor and Trustee, was represented by Marvin Evans as its attorney therein, and said Carrie Welch was represented by John F. Watson, as her attorney therein, wherein and whereby a partition and division of the community estate of decedent and the said Carrie Welch, real and personal, therein particularly de-

Exhibit "K"—(Continued.)

scribed and/or referred to, and hereinafter in this Decree particularly described, have been mutually agreed upon as an equitable and just distribution thereof.

That Martin Stearns, Bert Witt and Fred Lasater, appointed by Order of this Court to view the property to be partitioned and distributed herein, have viewed same, and now testifying in open court recommend that there be partitioned and distributed to the said Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as Trustee herein, the real estate and personal property described and referred to in said Stipulation and hereinafter particularly described, to be so partitioned and distributed to it, in its just, *just,* fair and equitable division of said community property, and that there be partitioned and distributed to the said Carrie Welch the real estate and personal property described and referred to in said Stipulation and hereinafter particularly described, to be so partitioned and distributed to her, is her just, fair and equitable division thereof, and that the terms and provisions of said Stipulation are just and equitable.

And it further appearing to the Court and the Court does herein find that the real estate and personal property described and referred to in said Stipulation therein mutually agreed upon as aforesaid to be partitioned and distributed to the said Baker-Boyer National Bank, of Walla Walla, Washington, as such Trustee, and to the said Carrie

Exhibit "K"—(Continued.)

Welch, is a just, fair and equitable division thereof to be partitioned and distributed to them respectively, and the Court does hereby fix and adopt the values of the several pieces and parcels of property as set forth and agreed upon in said Stipulation as being, in the light of the evidence, the fair and reasonable value thereof.

That the following are the names of all the heirs at law, each of them competent and of the age of majority, to-wit: Carrie Welch, the surviving spouse of decedent, residing at Walla Walla, Washington, Fred B. Welch, a son of decedent, now residing at College Place, Washington, and George B. Allen, a grandson of decedent, residing at Seattle, Washington.

That the following are the names of all the legatees and devisees named and provided for in the Last Will and Testament of decedent and Codicil thereto, to-wit: The said Carrie Welch, the said Fred B. Welch, the said George B. Allen, and in addition thereto Tena Haas, formerly Tena Zuest, residing at Walla Walla, Washington, Mrs. Clara Pitt, residing at Oakland, California, Board of Conference Claimants, Inc. of the Pacific Northwest Annual Conference, Methodist Episcopal Church, having its offices in Seattle, Washington, and the Baker-Boyer National Bank, of Walla Walla, Washington, in trust for the uses and purposes set forth in said Last Will and Testament and Codicil thereto and hereinafter specifically set forth.

That the cash bequests of $500.00 each to the said

Exhibit "K"—(Continued.)

Tena Haas, formerly Tena Zuest, and to Mrs. Clara Pitt have been fully paid.

That $5500.00 is a reasonable compensation to be allowed said Executor for its services herein; that $5500.00 is a reasonable attorney's fee to be allowed Marvin Evans for legal services rendered by him herein.

That other than the final determination of the Federal Estate Tax and the State Inheritance Tax herein said estate has been fully administered upon and is ready to be closed.

And the Court being fully advised in the premises and now on motion of Marvin Evans, as attorney for said Executor, and no objections having been made or filed herein;

It Is Therefore Considered, Ordered, Adjudged and Decreed as follows:

1. That said Final Account and Report and said Supplemental Account be and the same hereby are in all respects allowed, approved and settled.

2. That there be and there hereby is allowed the Baker-Boyer National Bank, of Walla Walla, Washington, for its compensation as such Executor herein the sum of $5500.00, and that there be and there hereby is allowed Marvin Evans for legal services rendered by him herein the sum of $5500.00

3. That pursuant to the provisions of the aforesaid referred to Stipulation bearing date the 7th day of April, 1938, there be and there hereby is distributed unto the said Carrie Welch in her own

Exhibit "K"—(Continued.)

separate right the following described real estate situated in the County of Walla Walla, State of Washington, to-wit:

Lot Twenty-three (23) of McAuliff's Addition to the City of Walla Walla, Washington, according to the official plat thereof of record in the office of the Auditor of said County of Walla Walla, excepting therefrom, however, the South five (5) feet of said Lot conveyed to the City of Walla Walla for the purpose of a public alley,
at the agreed valuation of.....$ 1,050.00

Also: Beginning at a point in the Southerly line of Birch Street in the City of Walla Walla, Washington, which point is 140.65 feet Easterly, measured along said Southerly line of Birch Street from the point of its intersection with the Easterly line of Fourth Avenue South (formerly Fourth Street) in said City; thence North 60° 10′ East, along said Southerly line of Birch Street, a distance of 76.60 feet to a point which is South 60° 10′ West 80.25 feet from the Westerly line of Third Avenue South (formerly Third Street); thence South 26° 33′ East, parallel to said Westerly line of Third Avenue, a distance of 140.70 feet; thence South 60° 10′ West 69.75 feet; thence Northwesterly in a straight line 140.50 feet, more or less, to the point of beginning,
at the agreed valuation of.....$ 2,000.00

Also: The Southeast quarter (SE¼) of Section Twenty-five (25) in Township Twelve (12) North, of Range Thirty-five (35) East of the Willamette Meridian.

Containing 160 acres, according to the official plat of U. S. Government Survey.

Also: All of Section Thirty-six (36) in Township Twelve (12) North, of Range Thirty-five (35) East of the Willamette Meridian.

Containing 640 acres, according to the official plat of U. S. Government Survey.

Exhibit "K"—(Continued.)

Also: The fractional Northwest quarter (NW¼) of Section Five (5) in Township Eleven (11) North, of Range Thirty-six (36) East of the Willamette Meridian, containing 159.12 acres, according to the official plat of U. S. Government Survey.

Also: The fractional North half (N½) of Section Six (6) in Township Eleven (11) North, of Range Thirty-six (36) East of the Willamette Meridian.

Containing 307.89 acres, according to official plat of U. S. Government Survey.

Excepting therefrom, however, the right of way of the Northern Pacific Railroad Company over and across the West half of the Northwest quarter of said Section 6.

Leaving a net acreage of 302.78 acres, more or less.

Also: The fractional South half (S½) of Section Thirty-one (31) in Township Twelve (12) North, of Range Thirty-six (36) East of the Willamette Meridian.

Containing 308.35 acres, according to the official plat of U. S. Government Survey.

Excepting therefrom the right of way of the Northern Pacific Railway Company over and across said premises.

Leaving a net acreage of 293.78 acres, more or less, at the total agreed valuation of.....$ 89,440.00

Also: The West half (W½) of Section Twenty-eight (28) in Township Twelve (12) North, of Range Thirty-six (36) East of the Willamette Meridian.

Containing 320 acres, according to the official plat of U. S. Government Survey.

The East half (E½) of Section Twenty-nine (29) in Township Twelve (12) North, of Range Thirty-six (36) East of the Willamette Meridian.

Containing 320 acres, according to the official plat of U. S. Government Survey.

The East half (E½) of Section Twenty-nine (29) in Township Twelve (12) North, of Range Thirty-six (36) East of the Willamette Meridian.

Containing 320 acres, according to the official plat of U. S. Government Survey.

Excepting therefrom, however, the following de-

Exhibit "K"—(Continued.)

Beginning at a point which is 30 feet East and 33 feet South of the Northwest corner of the Southeast quarter of said Section 29, and running thence South 12½ rods; thence East 12½ rods; thence North 12½ rods, and thence West 12½ rods to the point of beginning, containing 1 acre, more or less.

Also excepting the right of way of the Northern Pacific Railway Company over and across the West half of Northeast quarter of said Section 29,

at the total agreed valuation of.....$ 35,145.00

Also: Beginning at a point on the westerly line of Catherine Street in the City of Walla Walla, Washington, which point is 180.00 feet Southerly, measured along said Westerly line of Catherine Street, from the point of intersection of same with the Southerly line of Birch Street in said City; thence South 29° 50′ East along said westerly line of Catherine Street, a distance of 60.00 feet; thence South 60° 10′ West 123 feet and 8 inches; thence North 29° 50′ West 60.00 feet; thence North 60° 10′ East 123 feet and 8 inches to the point of beginning.

Being the Southerly 60 feet of Lot One (1) in Block Twenty-eight (28) of Roberts' Addition to the City of Walla Walla, according to the official plat thereof,

at the agreed valuation of.....$ 5,500.00

Also the following described real estate situated in the County of King, State of Washington, to-wit:

Lot Three (3) in Block Two (2) Highlands Addition to the City of Seattle, according to the official plat and survey thereof now on file and of record in the office of the County Auditor of said King County, Washington, at the agreed valuation of.....$ 2,500.00

making a grand total of the agreed valuation of real estate herein distributed unto her in the sum of.....$135,635.00

Exhibit "K"—(Continued.)

And that there likewise be and there hereby is distributed unto her, the said Carrie Welch, in her own separate right, the following described personal property, to-wit:

Balance against one-third share in 900 acres 1937 wheat crop, valued at	$ 1,186.50
Walla Walla Canning Company first mortgage Leasehold 6% Bonds of 5/1/46, Numbered 3, 4 and 5 at $1000.00 each, valued at	$ 3,000.00
Northwest Toll Bridge Co. 5% Debenture of 1/1/46 ($600.00 P. V.) Bond #DC337, valued at	$ 180.00
Household goods and personal effects, valued at	$ 757.10
Automobile, valued at	$ 1,000.00
Overdraft on 1937 income	$ 559.80

Stocks:

Walla Walla Canning Company Capital Stock (non par) Certificate # 75—2 shares " #186—2 shares " #304—1 share	
Total valuation	$ 375.00
Walla Walla Canning Company Preferred Stock (100 par) 5 shares of Certificate #151, valued at	$ 500.00
Milton Box Company Capital Stock (100 par) 12½ shares in Certificate #138, valued at	$ 1,250.00
Walla Walla Farmers Agency Capital Stock (100 par) Certificate #70—20 shares " #98— 4 shares valued at	960.00
Walla Walla Farmers Exchange Capital Stock (10.00 par) Certificate #150— 15 shares " #285— 23 shares " #286— 57 shares " #287— 20 shares " #293— 46 shares " #294— 57 shares	
Total 218 shares Valued at	218.00

Exhibit "K"—(Continued.)

Gas Ice Corporation common stock (non par)
Certificate # 51—250 shares
75 shares in
Certificate #171, total 325 shares,
Valued at..... 325.00

Klickitat Mineral Springs, Inc. Capital Stock (non par)
Certificate #24—250 shares,
Valued at..... 125.00

Tum-a-Lum Lumber Company 4% Preferred Stock (100 par)
50 shares in Certificate #18
Valued at..... 4,000.00

Consolidated Securities Company Common Stock (non par) 2½ shares in Certificate #116
Valued at..... 62.50

Walla Walla Grain Growers 7½ shares
P. V. $30.00 per share,
Valued at..... 7.50

Consolidated Securities Company Participation Certificates 40% remaining unpaid on Certificate Face $1236.07, 40% remaining unpaid on Certificate Face $12,891.40,
Total valuation..... 2,542.95

Mortgage Loans:

Friederich and Mamie Schmidt,
Face originally $2500.00,
dated 7/15/25 due 7/15/35, interest 6%
Valued at.....$ 600.00

Oliver T. Cornwell, et al,
Face $10,500.00, Dated 12/1/33 due 12/1/38,
interest 6% annually, Valued at.....$ 10,500.00

Jacky & Fiedler, Inc.
Face $5500.00, dated 6/12/35 due 6/12/40,
interest 7% semi-annually, Valued at.....$ 5,500.00

Notes:

Milton Box Company,
One note $4000.00, dated 5/9/34 due 11/9/34,
Int. 8% Valued at.....$ 4,000.00

C. H. & C. B. Harris note,
Face $1500.00, dated 5/1/33 due 5/1/42
Interest 5% Valued at.....$ 1,500.00

Exhibit "K"—(Continued.)

Elizabeth Bellingham
Face $1000.00, dated 2/14/20 due 2/14/21
Int. 6% on which substantial amounts of principal and interest have been paid,
Valued at.....$ 190.00

Additional Stock:
Northwest Toll Bridge Co. Capital Stock
(non par) 10 shares in Certificate No. 238.
Wauna Toll Bridge Co. Preferred Stock
(100 par) 53 shares in Certificate No. 68.
Wauna Toll Bridge Co. Common Stock (non par)
Certificate No. 103—50 shares
No. 356— 3 shares
23 shares in
Certificate No. 351

Total..... 76 shares
making a grand total of the agreed valuation of
personal property in the sum of.....$ 39,339.35

4. That pursuant to the provisions of the aforesaid referred to Stipulation, bearing date the 7th day of April, 1938, there be and there hereby is distributed unto the Baker-Boyer National Bank, of Walla Walla, Washington, in trust, nevertheless, for each and every of the uses and purposes set forth in the Last Will and Testament and Codicil thereto of decedent in the order therein set forth, reference in respect thereto being hereto made and to constitute a part hereof as much so as if set forth herein verbatim, in its own separate right as such Trustee, the following described real estate situated in the County of Walla Walla, State of Washington, to-wit:

Exhibit "K"—(Continued.)

The Northwest Quarter of the Northeast Quarter, the North Half of the Northwest Quarter and the Southwest Quarter of the Northwest Quarter of Section Two (2), the North Half of Section Three (3), the East Half and the Northwest Quarter of Section Nine (9), the North Half of Section Ten (10), and Section Eleven (11), all in Township Eleven (11), North of Range Thirty-five (35) East of Willamette Meridian, containing 1925.04 acres,

And in addition thereto the Northeast Quarter of Section Sixteen (16) in the aforesaid Township and Range held under lease from the State of Washington, and known as the State School Land,

at the agreed valuation of.....$ 76,652.00

Also: The South half of the Southwest quarter (S½SW¼) of Section One (1) in Township Six (6) North, of Range Thirty-five (35) East of the Willamette Meridian,

Excepting therefrom the right of way of State Road No. 3 (Inland Empire Highway) along the North side of said premises and County Road.

Containing 77.60 acres, more or less.

Also: The Southwest quarter of the Southeast quarter of Section One (1) in Township Six (6) North, of Range Thirty-five (35) East of the Willamette Meridian.

Excepting therefrom the right of way of State Road No. 3 (Inland Empire Highway) along the North side of said premises.

Containing 39.40 acres, more or less.

Also: The Southeast quarter of the Southeast quarter (SE¼SE¼) of Section Two (2) in Township Six (6) North, of Range Thirty-five (35) East of the Willamette Meridian,

Excepting therefrom the right of way of State Road No. 3 (Inland Empire Highway) along the North side of said premises.

Containing 39.10 acres, more or less.

Exhibit "K"—(Continued.)

Also: The West half of the Northwest quarter (W½NW¼) of Section Twelve (12) in Township Six (6) North, of Range Thirty-five (35) East of the Willamette Meridian. Excepting County road along West side.

Containing 78.20 acres, more or less,
at the total agreed valuation of.....$ 16,859.16
making a grand total of agreed valuation of all the
real estate hereinbefore described in the sum of.....$ 93,610.16

Also: Beginning at a point in the Southerly line of Birch Street in the City of Walla Walla, Washington, which point is 140.65 feet Easterly, measured along said Southerly line of Birch Street from the point of its intersection with the Easterly line of Fourth Avenue South (formerly Fourth Street) in said City; thence South 60° 10′ West, along said Southerly line of Birch Street, a distance of 82.65 feet to a point in a line drawn parallel to and distant 58.00 feet Easterly, measured at right angles, from said Easterly line of Fourth Avenue South; thence South 29° 50′ East, along said parallel line, a distance of 140.47 feet; thence North 60° 10′ East 69.57 feet; thence South 26° 33′ East 20.00 feet; thence North 60° 10′ East 12.00 feet; thence North 26° 33′ West 20.00 feet; thence Northwesterly in a straight line 140.50 feet, more or less, to the point of beginning.

Together with an Agreement in writing of date March 18, 1938, being the only Agreement in writing in respect thereto to sell and convey said real estate to Guy Nelson and Hazel L. Nelson, his wife, including all the personal property in said Agreement described on which there is remaining unpaid on the agreed purchase price therefor the sum of $3200.00, subject to the terms and conditions in said Agreement set forth,
at the agreed valuation of.....$ 3,200.00

And that there likewise be and there hereby is distributed unto the Baker-Boyer National Bank,

Exhibit "K"—(Continued.)

of Walla Walla, Washington, in its capacity as Trustee of the estate of decedent aforesaid, in its own separate right, the following described personal property, to-wit:

Bonds:

Federal Farm Mortgage Corporation 3% of 44/49 Registered $1300 P. V. Bond #4918J 1 at $1000. #6806F, #6807H, #6808J 3 at $100, at the agreed valuation of	$ 1,316.25
Walla Walla Funding Water Extension 4½% of 7/1/54 $10,000 P. V. Bonds #371 to #380, inclusive, 10 at $1000. at the agreed valuation of	$ 10,400.00
Gardena Farms District #13 Walla Walla Co., 6% P. V. 5500 Series M. Bond #53 due 7/1/44 1 at $500. Series N Bond #56, 57, 59, 60, 61, 62, 63, 64, due 7/1/45 8 at $500. Series O Bond 65, 70 due 7/1/46 2 at $500. at the agreed valuation of	$ 5,500.00
Walla Walla Canning Company First Mortgage Leasehold 6% of 5/1/46 $2000.00 P. V. Bonds 6 and 7 at $1000.00, at the agreed valuation of	$ 2,000.00
Northwest Toll Bridge Company 5% Debenture of 1/1/46 $600.00 P.V. Bond #DC338 at $600., at the agreed valuation of	$ 180.00

Participation Certificate:

National Bondholders Corporation Participation Certificate Mortgage, Guarantee, Series A-1 No. MGA #700 to 709, 10 at $1000. Face Value $10,000. Paid on principal 41% at the agreed valuation of	$ 2,500.00
National Bondholders Corporation Participation Certificate, Central Funding Series B CFB 531, 2442, 2443, 3 at $1000. Face $3000. Paid on principal 45%, at the agreed valuation of	$ 780.00

Exhibit "K"—(Continued.)

National Bondholders Corporation Participation Certificate Central Funding Series C CFC 1855 to 1862, inclusive, 8 at $1000. Face $8000. Paid on Principal 45%,
at the agreed valuation of.....$ 2,080.00

National Bondholders Corporation Participation Certificate Central Funding Series D CFD 1960, 1961 2 at $1000. Face $2000. Paid on Principal 45%,
at the agreed valuation of.....$ 520.00

National Bondholders Corporation Participation Certificate Mortgage Bond Series E MBE 58 1 at $500.00, Face, MBE522 to 524, inclusive, MBE 582, 730, 731, 969, MBE 1063, 1419, 1435, 1436, 11 at $1000. Face $11,500. Paid on Principal 46%,
at the agreed valuation of.....$ 2,530.00

National Bondholders Corporation Participation Certificate, Southern Securities Series A SSNU4 1 at $500. Face $500. Paid on Principal 55%,
at the agreed valuation of.....$ 85.00

National Bondholders Corporation Participation Certificate Investors Mortgage Series D IMD 51, 52, 2 at $1000 Face $2000. Paid on Principal 41%
at the agreed valuation of.....$ 340.00

National Bondholders Corporation Participation Certificate, Union Mortgage Series G UMG 419, 420, 421 3 at $1000 Face—$3000. Paid on Principal 64%
at the agreed valuation of.....$ 270.00

National Bondholders Corporation Participation Certificate, Central Funding Series A CFA 104, 241, 2 at $500. Face CFA 1569 1 at $1000. —$2000. Paid on principal 45%
at the agreed valuation of.....$ 520.00

Walla Walla Canning Company Capital Stock (non par) Certificate #435—5 shares
at the agreed valuation of.....$ 375.00

Exhibit "K"—(Continued.)

Walla Walla Canning Company Preferred Stock (100 par) 5 shares in Certificate #151
at the agreed valuation of.....$ 500.00

Milton Box Company Capital Stock (100 par) 12½ shares in Certificate #138,
at the agreed valuation of.....$ 1,250.00

Walla Walla Farmers Exchange Capital Stock $10.00 par)

Certificate # 18—100 shares
" #281—125 shares

Total..... 225 shares
at the agreed valuation of.....$ 225.00

Walla Walla Farmers Agency Capital Stock ($100.00 par)

Certificate #115— 2 shares
" #116— 2 shares
" #129— 4 shares
" #139—16 shares

Total..... 24 shares
at the agreed valuation of.....$ 960.00

Northwest Toll Bridge Co. Capital Stock (non par) 10 shares in Certificate No. 238.

Wauna Toll Bridge Co. Preferred Stock (100 par) 53 shares in Certificate No. 68

Wauna Toll Bridge Co. Common Stock (non par) 77 shares in Certificate No. 351.

Gas Ice Corporation Common stock (non par) 325 shares in Certificate #171,
at the agreed valuation of..... $ 325.00

Klickitat Mineral Springs Inc. Capital Stock (non par) Certificate #56 250 shares,
at the agreed valuation of.....$ 125.00

Tum-a-Lum Lumber Company 4% Preferred Stock (100 par) 50 shares in Certificate #18,
at the agreed valuation of.....$ 4,000.00

Consolidated Securities Company Common Stock (non par) 2½ shares in Certificate #116,
at the agreed valuation of.....$ 62.50

Exhibit "K"—(Continued.)

Walla Walla Grain Growers 7½ shares, P. V. $30.00,
at the agreed valuation of.....$ 7.50

Consolidated Securities Company Participation Certificate, 40% remaining unpaid on Certificate Face $1236.07, 40% remaining unpaid on Certificate Face $12,891.40,
at the agreed valuation of.....$ 2,542.95

Mortgage Loans:

Marvin Evans Face $16,000.00, Interest 5% Paid on principal $6000.00, Dated 11/2/32 due 12/15/38
at the agreed valuation of.....$ 10,000.00

Cleve and Lucy B. Prather, Face $750.00, Interest 6% dated 10/1/30 due 10/1/32
at the agreed valuation of..... 774.38

Notes:

Henry H. and Flora Moore Bennett, Face $1000.00, Interest 7% Paid on principal $2.50 Dated 10/9/37 due 10/9/38
at the agreed valuation of..... 997.50

J. T. Crawford, Face $10,000.00, Interest 6% Dated 11/14/32 due 11/14/37
at the agreed valuation of.....$ 10,000.00

Milton Box Company, one note for $4000.00 Dated 5/9/34 due 11/9/34 Interest 8%
at the agreed valuation of.....$ 4,000.00

C. H. and C. B. Harris Face $2250.00, Interest 5% Dated 5/1/33 due 5/1/41
at the agreed valuation of.....$ 2,250.00

W. W. Harvey, Face $12,000.00, Interest 5% Dated 5/24/37 taken in lieu of lost or misplaced promissory note
at the agreed valuation of.....$ 2,222.16

Miscellaneous:

⅓ interest in ..... head of cattle on ranch April 7, 1938 rented to E. E. Reever,
at the agreed valuation of.....$ 125.00

⅓ interest in hog on ranch April 7, 1938 rented to E. E. Reever,
at the agreed valuation of.....$ 4.00

Exhibit "K"—(Continued.)

The $20,000.00 promissory noted dated November 20, 1937, made and executed by Glen A. Smith and Clara T. Smith, his wife, bearing interest at the rate of 5% per annum, payable annually, due November 20, 1947, and secured by mortgage of even date therewith on real estate therein described, and which said mortgage was filed for record November 30, 1937, and recorded in Book 152 of Mortgages at page 272 in the office of the County Auditor of said Walla Walle County,
at the agreed valuation of.....$ 20,000.00

One promissory note bearing Serial No. 18, of date September 23, 1937, in the principal sum of $2500.00, made and executed by A. J. Naimy and Josephine Naimy, his wife, and Harry Winget and Laura Winget, his wife, due October 1, 1945, bearing interest at the rate of six per cent per annum, interest payable semi-annually, and secured by mortgage of even date therewith on real estate therein described, and recorded September 30, 1937, in Book 152 of Mortgages at page 148 in the office of the County Auditor of said Walla Walla County,
at the agreed valuation of.....$ 2,500.00

State Line Telephone Co. Capital Stock (100 par) Certificate #72—¼ share,
making a grand total of agreed valuation of personal property, including the remaining unpaid balance of $3200.00, pursuant to the terms and conditions of the aforesaid Agreement in writing of date March 18, 1938 to sell certain real estate above described to Guy Nelson and Hazel L. Nelson, his wife, in the sum of.....$ 95,467.24

5. That pursuant to the provisions of the aforesaid referred to Stipulation bearing date the 7th day of April, 1938, and pursuant to the provisions of Paragraph "VI" of the Last Will and Testa-

Exhibit "K"—(Continued.)

ment of decedent, there be and there hereby is distributed unto the said Carrie Welch in her own separate right an undivided one-half interest in and to the following described lands and premises, situated in the County of Walla Walla, State of Washington, to-wit:

Beginning at a point on the East line of Section 33, in Township 7 North, of Range 34 East of the Willamette Meridian, which is 10 chains North of the quarter corner on the East side of said Section 33; thence North on the East line of said Section 33 and the East line of Section 28, said Township and Range, to a point in the East line of said Section 28, which is 50 feet South of the center line of the main track of the Walla Walla and Columbia River Railroad (Oregon Railroad and Navigation Company) measured on a line drawn at right angles to said center line; thence Westerly on a line drawn parallel to and distant 50 feet Southerly from said center line of said Railroad, to a point in the North and South center line of said Section 28; thence South and on said center line of said Section 28 and the center line of Section 33 aforesaid, to a point in said center line of Section 33, which is 10 chains North of the center point of said Section 33; thence East 39.32 chains to the point of beginning.

Also: Beginning at a point in the North line of the Louis Dauney Donation Claim, which is 60 feet West of the point of intersection of said North line with the North and South center line of Section 28, Tp. 7 N.R. 34, E. W. M. thence West 4.50 chains;

Exhibit "K"—(Continued.)

thence South 14.95 chains; thence North 72° 20′ West 6.84 chains; thence South 7.42 chains to the Walla Walla River; thence following the meanderings of said River in a general Easterly direction, and along its North bank as follows: N. 56° 29′ E. 2.07 chains; N. 83° 24′ E. 2.49 chains; thence 36° 54′ E. 1.50 chains; thence S. 10° 06′ E. 4.32 chains; thence S. 76° 12′ E. 1.19 chains; thence N. 20° 23′ E. 7.40 chains; thence N. 75° 13′ E. to a point on the North bank of said River which is 60 feet West of said North and South center line of Section 28, measured on a line at right angles thereto; thence North 18.35 chains to the point of beginning.

Together with all easements, rights of way, water and water rights thereunto belonging or appurtenant to the lands and premises above described.

Said Louis Dauney Donation Claim being Claim No. 38, according to the Official Plat thereof in the office of the Surveyor General of the United States and being parts of Sections 28, 29, 32 and 33 in Township seven (7) North, of Range thirty-four (34) East of the Willamette Meridian.

Excepting therefrom the right of way of the Oregon-Washington Railroad and Navigation Company, formerly Walla Walla and Columbia River Railroad Company, and a life estate in the remaining undivided one-half thereof; and that there be and there hereby is distributed unto Fred B. Welch, son of said deceased, said remaining undivided one-half thereof, subject to the life estate of his mother, the said Carrie Welch.

Exhibit "K"—(Continued.)

6. That pursuant to the provisions of the aforesaid referred to Stipulation bearing date the 7th day of April, 1938, and pursuant to the provisions of Paragraph "V" of decedent's Last Will and Testament as limited by the provisions of said Stipulation, all the rents, issues and profits of and from all of the property of the estate of the said George T. Welch, deceased, and the said Carrie Welch, his surviving spouse, accruing since the death of the said George T. Welch and up to the time of the entry of this Decree, less payments thereof heretofore made to said Carrie Welch and also less general property taxes and other expenses properly chargeable and paid out of said income, be and the same hereby are distributed to the said Carrie Welch.

7. That pursuant to the provisions of the aforesaid referred to Stipulation bearing date the 7th day of April, 1938, and pursuant to the provisions of Paragraph "V" of decedent's Last Will and Testament as limited by the provisions of said Stipulation, all the rents, issues and profits of and from all cash and other property, real and personal, of the estate of the said George T. Welch, deceased, distributed pursuant to said Stipulation to said Baker-Boyce National Bank, of Walla Walla, Washington, as Trustee aforesaid, after deducting therefrom all charges and expenses properly payable therefrom, shall be by said Trustee and said Trustee is hereby directed to pay same over to said Carrie Welch during the remainder of her natural

Exhibit "K"—(Continued.)

life, said payments to be made semi-annually or at shorter intervals when convenient and reasonable; it being understood that the compensation to be paid said Bank as such Trustee for its services herein shall be one-half of one per cent per annum of the value of said trust estate for all services incidental to the collection and distribution of such rents, issues and profits during the remainder of her natural life.

8. That there be and there hereby is distributed unto the said Carrie Welch in her own separate right an undivided one-half interest in and to the following described personal property shown in the original Inventory and Appraisement of said estate, to-wit:

Transamerica Corporation Capital Stock Certificates

Certificate	#SF/E 71827—	100 shares
"	71828—	100 shares
"	71829—	100 shares
"	71830—	100 shares
	#SF/D 76189—	10 shares
	Total	410 shares

Bancamerica-Blair Corporation Capital Stock Certificate SFF79053 8 shares,

And in addition thereto Bank of America Capital Stock Certificate #A1972 41 shares (Received as distribution on Transamerica Stock),

Exhibit "K"—(Continued.)

and that there be and there hereby is distributed unto the Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as Trustee of the estate of decedent as aforesaid, in its own right, the remaining undivided one-half interest therein and thereto, subject to the payment by said Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as Trustee of the estate of decedent as aforesaid, in its own right, the remaining undivided one-half interest therein and thereto, subject to the payment by said Baker-Boyer National Bank, of Walla Walla, Washington, as Trustee aforesaid, of all the net rents, issues and profits therefrom, or of the proceeds of the sale or other disposition made thereof, to said Carrie Welch during the remainder of her natural life.

9. That there be and there hereby is distributed unto the said Carrie Welch out of the residue of the community estate of the said George T. Welch, deceased, and herself as his surviving spouse, in cash, the sum of $34,380.96, and that there be and there hereby is distributed unto the said Baker-Boyer National Bank, of Walla Walla, Washington, in its capacity as Trustee herein, the remaining portion of said cash in the sum of $19,653.79, pursuant to the terms of Subdivision (5) of said Stipulation.

10. That should there be any property of the corpus of said community estate, real or personal, other than the community property hereinbefore distributed, the same is hereby distributed in equal shares to said Carrie Welch and to the said Baker-

Exhibit "K"—(Continued.)

Boyer National Bank, of Walla Walla, Washington, as Trustee aforesaid.

11. That the aforesaid named Carrie Welch, Fred B. Welch and George B. Allen are the sole and only heirs at law of decedent and three of the beneficiaries named and provided for in decedent's said Last Will and Testament, and that in addition to them the aforesaid named Tena Haas, formerly Tena Zuest, Mrs. Clara Pitt, Board of Conference Claimants, Inc. of the Pacific Northwest Annual Conference, Methodist Episcopal Church, having its offices in Seattle, Washington, and the Baker-Boyer National Bank, of Walla Walla, Washington, in trust for the uses and purposes set forth in said Last Will and Testament and Codicil thereto, are the remaining beneficiaries named and provided for in said Last Will and Testament of decedent, and that the aforesaid named Carrie Welch, Fred B. Welch, George B. Allen, Board of Conference Claimants, Inc. of the Pacific Northwest Annual Conference, Methodist Episcopal Church, having its offices in Seattle, Washington, and the Baker-Boyer National Bank, of Walla Walla, Washington, in trust for the uses and purposes set forth in said Last Will and Testament and Codicil thereto of decedent, are the legatees and devisees or persons entitled to have the property of decedent distributed to them in the proportions and in the manner hereinbefore in this Decree set forth, and that all debts have been paid.

12. That the said Baker-Boyer National Bank, of Walla Walla, Washington, continue in its capa-

Exhibit "K"—(Continued.)

city as Executor herein until the remainder, if any, of the Federal Estate and State Inheritance Taxes are finally determined and paid herein, and due receipts issued therefor.

Done and dated in open court this 9th day of May, 1938.

(Signed) TIMOTHY A. PAUL
Judge

Presented by:
MARVIN EVANS
Attorney for Estate.

[Endorsed]: Filed May 9, 1938.

EXHIBIT "L"

121 Old Capitol Building
Telephone 1440

Address All Communications
To The Supervisor

State of Washington
Inheritance Tax and Escheat Division
Olympia
March 19, 1938

Re: Estate of George T. Welch, Deceased.
No. 26994 Walla Walla. 4-15-37.

Marvin Evans, Attorney,
601 Baker Building,
Walla Walla, Washington.

Dear Sir:

We aclnowledge receipt of your letter of March

16th enclosing inheritance tax report in the above entitled estate, copy of court order for widow's allowance, copy of federal estate tax return from 706 required by statute together with check payable to the State Treasurer in the sum of $685.51 which amount we have deposited with the State Treasurer as a partial payment of the inheritance tax in this estate, pending receipt of a copy of the federal audit of the estate tax return form 706, showing all changes made and final determination of the Federal Estate Tax required by statute. Please furnish us with a copy of this audit at your earliest convenience.

In your inheritance tax report submitted, you have claimed as exempt the remainder of certain trusts after deducting the life estate, and also the residue of the estate placed in trust as provided under section IX of the last will and testament. Gifts or transfers of property made under section 11218-A, in order to be exempt, must be limited for use within the State of Washington; it therefore appears that these transfers are subject to state inheritance taxes under the statute. See recent Supreme Court decision re: Estate of George A. Colman.

We suggest that you have the executor send us remittance payable to the State Treasurer on the above mentioned bequests passing to Class "C" beneficiaries. If the tax is not paid within the fifteen month period provided by statute, 8% interest will be added thereto, from date of death to date of payment. On receipt of a copy of the federal audit

above referred to, we will then notify you as to any balance of inheritance tax remaining unpaid.

Yours very truly,
WILLIAM H. PEMBERTON,
Supervisor,
By H. H. MARTIN

EXHIBIT "N"

In the Superior Court of the State of Washington
In and for the County of Walla Walla

In the matter of the Estate
of
GEORGE T. WELCH, Deceased.
BAKER-BOYER NATIONAL BANK, a corporation, as Executor and Trustee,
Petitioner,

vs.

STATE OF WASHINGTON, Inheritance Tax and Escheat Division,
Respondent.

No.....

PETITION

Dated March 22, 1940.

Comes now Baker-Boyer National Bank, a corporation, of Walla Walla, Washington, petitioner herein, and respectfully shows:

I.

That petitioner is now and at all times during the probating of the above named estate has been the duly appointed, qualified and acting executor of said estate; that your petitioner was nominated in the Will of decedent also as trustee to hold in trust the "rest, residue and remainder" of the estate, subject to the life estate of Carrie Welch, widow of decedent, for certain charitable purposes and by stipulation with the widow, and pursuant to decree of distribution entered herein, said bank as trustee is now holding in trust the decedent's community one-half of the net estate, less specific bequests already paid.

II.

That all of the property coming into your petitioner's hands as trustee was duly appraised by three appraisers appointed by the court, one of whom was nominated by the Inheritance Tax and Escheat Division of the State Tax Commission; that the amount of said appraisement was $450,-107.95; that after deducting debts and costs, the amount of the net estate was $440,386.35, of which decedent's community one-half was $220,193.18.

III.

That your petitioner filed an inheritance tax report showing tax due of $685.51, which has been paid; that said tax was determined in the following manner:

Class "A" beneficiaries:			
Carrie Welch, widow, life estate	$18,463.62		
Fred B. Welch, son, life estate	17,547.22		
George B. Allen, grandson, life estate	10,764.58		
Total to Class "A" beneficiaries	$46,775.42		
Less Class "A" exemption	10,000.00		
Balance	$36,775.42		
Taxable at 1%	15,000.00	Tax	$ 150.00
Taxable at 2%	$21,775.42	"	435.51
Class "C" Beneficiaries:			
Tona Haas (Zuest) no relationship	500.00		50.00
Clara Pitt no relationship	500.00		50.00
Total Tax			$ 685.51

That the inheritance tax report as filed with the Inheritance Tax and Escheat Division showed that the remainder of the estate went to "charity" and other tax exempt purposes.

IV.

That decedent's will provides in Paragraph V thereof that, after payment of the two bequests each of $500.00:

> "I do hereby give, devise and bequeath unto my said wife, Carrie Welch, for and during her lifetime, should she survive me, all the rest, residue and remainder of my estate, both real and personal, including the rents, issues and profits therefrom, and whatsoever the same may consist and wheresoever situate, with the distinct understanding that no limitation is placed on my wife in any expenditures which she may make for any purpose, or any accounting be

made thereof, with the then remainder over her death unto my trustee, hereinafter named, in trust, nevertheless, for the uses and purposes hereinafter mentioned, and more particularly set forth, save and except my community undivided one-half interest in certain lands hereinafter described, which I hereinafter give and devise unto my son, Fred B. Welch, freed from any trust provision of my will * * *."

And further provides at the beginning of each of paragraphs VI, VII and VIII thereof:

"Subject to the life estate hereinbefore given, devised and bequeath unto my said wife, Carrie Welch, should she survive me, as aforesaid, * * *"

V.

That all of the aforesaid estate was jointly acquired by the resourcefulness, energy and sound business practices of the said George T. Welch and his wife, Carrie Welch; upon their marriage that they pooled and added together their possessions and the said estate grew through their combined efforts; that during all the marital years, the husband managed the estate; that the widow has never claimed ownership of more than her community half, or claimed any interest in the other half of the estate, except as a devisee of a life estate under the will of decedent; that before the entry of decree of distribution herein, a stipulation was entered into between the widow and your petitioner as trustee whereby the estate was to be partitioned and one-half set over to Carrie Welch, the widow, as her sole and separate

property, and the other half to the petitioner, as trustee under the will; that said partition and stipulation was approved by the court, and the estate distributed accordingly; that the executor was not discharged, the estate being kept open for the express purpose, among others of settling the State Inheritance Tax, although petitioner is now in possession of said estate under said Decree, as Trustee and is executing its said trust.

VI.

That after the payment of the inheritance tax as stated in Paragraph III, your petitioner received from the Inheritance Tax and Escheat Division a letter, a copy of which is attached, marked Exhibit "A" and made a part of this petition for all purposes; that your executor alleges that the position taken by respondent, Inheritance Tax and Escheat Division in said letter wherein it is contended that the transfer of the remainder of the trust and the residue of the estate in order to be exempt must be limited for use in the State of Washington is erroneous for the reason that the charitable trust passes to the legatee in Oregon, who is entitled to the same exemption as would apply if the said bequests were limited for use in the State of Washington; that the inheritance tax if assessed in accordance with said letter will amount to $34,883.13.

VII.

That the said Inheritance Tax Division now proposes to increase the total valuation of the total community estate from $451,107.95 to $454,988.99.

VIII.

That your petitioner as trustee pays to Carrie Welch, the widow of decedent, all of the income from the trust funds and properties, but that the will has never been expressly construed to determine whether Carrie Welch has power under the will to use and expend any part of the corpus of the estate or the duties of the Trustee in such event; or the amount of the estate vested in the remaindermen upon the death of the testator, or the interest chargeable with any inheritance tax due and payable to the State of Washington; that until the will has been construed with reference to those matters, your petitioner, should it pay the additional tax now demanded, would have no assurance that further tax might not thereafter be demanded; that the inheritance tax is a lien until paid on all the decedent's community half of the estate; that until a construction of the will with reference to the matters above mentioned, and until final determination of the inheritance tax, your petitioner, as such executor and trustee will be hampered in handling the estate, particularly in making sales; that if the said Carrie T. Welch under the terms of said will takes either the fee title to said estate or the right to invade the corpus of the estate, the amounts left by decedent for education and charitable purposes and to the son and grandson of decedent are uncertain.

Wherefore your petitioner prays the court to fix a time and place for the hearing of this petition; and further prays the court to cite the Supervisor of the State Inheritance Tax Division to appear at

such hearing; and further prays the court at such hearing to construe the will of decedent and particularly the portion thereof quoted in Paragraph IV of this petition, as to the nature of the estate of decedent's widow, and as to the scope of her power to expend the corpus; and further prays the court at said hearing to determine the value of the estate of decedent for purposes of computing the inheritance tax; and further prays the court to determine whether the charitable and educational trusts and bequests for which the will makes provision are tax exempt purposes; and further prays the court to determine the amount of inheritance tax due from the estate to the State of Washington.

BAKER-BOYER NATIONAL BANK

By .....

Its .....

Petitioner.

State of Washington,
County of Walla Walla—ss.

N. A. Davis, being first duly sworn, on oath deposes and says: That he is the Vice President of the Baker-Boyer National Bank, a corporation, petitioner above named, and is authorized to and does hereby make verification of said petition for and on behalf of petitioner; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

.....

Subscribed and sworn to before me this 22 day of March, 1940.

.....

Notary Public in and for the State of Washington, residing at Walla Walla.

State of Washington
Inheritance Tax and Escheat Division
Olympia

March 19, 1938

Re: Estate of George T. Welch, Deceased
No. 26994 Walla Walla 4-15-37

Marvin Evans, Attorney
601 Baker Bldg.,
Walla Walla, Washington.

Dear Sir:

We acknowledge receipt of your letter of March 16th enclosing inheritance tax report in the above entitled estate, copy of court order for widow's allowance, copy of federal estate tax return form 706 required by statute together with check payable to the State Treasurer in the sum of $685.51, which amount we have deposited with the State Treasurer as a partial payment of the inheritance tax in this estate, pending receipt of a copy of the federal audit of the estate tax return form 706, showing all changes made and final determination of the Federal Estate Tax required by statute. Please furnish us with a copy of this audit at your earliest convenience.

In your inheritance tax report submitted, you

have claimed as exempt the remainder of certain trusts after deducting the life estate, and also the residue of the estate placed in trust as provided under section IX of the last will and testament. Gifts or transfers of property made under section 11218-A, in order to be exempt, must be limited for use within the State of Washington; it therefore appears that these transfers are subject to state inheritance taxes under the statute. See recent Supreme Court decision re: Estate of George A. Colman.

We suggest you have the executor send us remittance payable to the State Treasurer on the above mentioned bequests passing to Class "C" beneficiaries. If the tax is not paid within the fifteen month period provided by statute, 8% interest will be added thereto, from date of death to date of payment. On receipt of a copy of the federal audit above referred to, we will then notify you as to any balance of inheritance tax remaining unpaid.

Yours very truly,
WILLIAM H. PEMBERTON
Supervisor.

Mr. Winter: I might say, in connection with the stipulation, Your Honor, there will be a duplication in exhibits of the stipulation and those attached to the complaint but we thought Your Honor wouldn't have to take the complaint—it might be more convenient if we made the stipulation in that form.

The Court: You Gentlemen let me read this stipulation, first; I will understand it better.

Mr. Poe: Certainly.

The Court: I would suggest that this stipulation be joined together a little bit more permanently and I would suggest a cover be placed on it.

(Reads stipulation.)

You may proceed.

Mr. Poe: Your Honor, there is another attorney here from Walla Walla, Mr. Marvin Evans, who may be a witness in this case.

Mr. Winter: We have no objection if he acts as a witness, to his taking any part in the proceedings.

The Court: If he is associated as Counsel in the case, you would like for him to be privileged to [4] argue the case and also be a witness?

Mr. Poe: Perhaps.

Mr. Winter: We have no objection.

The Court: Mr. Evans is recognized as Associate Counsel in the case and he is privileged to testify in the case without preventing him from arguing.

Mr. Sherwood: Mr. Evans is admitted to practice in the Eastern District, not Western District. I would like to move his admission, for the purpose of this case. He has never been formally admitted in this District.

The Court: Is there any reason he should not be admitted, for the purpose of this case?

(No reply.)

The Court: He is admitted for the purpose of this case, in this District.

Mr. Poe: Your Honor, would you like to hear a statement in regard to the plaintiff's position?

The Court: I think it might be appropriate.

Mr. Poe: I knew you had the stipulation and were familiar with the complaint.

Briefly, this case involves the interpretation of the will and probably hinges on that particular paragraph.

(Makes opening statement on behalf of the plaintiff herein.)

Mr. Winter: I have just one word.

We believe this case involves, principally, one issue and that is, what amount, if any, passed to [5] charity under the terms of this Will.

(Makes opening statement on behalf of the defendants herein.)

The Court: Call your first witness.

Mr. Sherwood: I will call Mr. Davis.

N. A. DAVIS,

called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Sherwood:

Q. State your name, please?

A. N. A. Davis.

Q. Mr. Davis, what official connection, if any, do you have with the Baker-Boyer National Bank, of Walla Walla, Washington?

A. I am Vice President and Manager of the Trust Department.

Q. How long have you been officially connected with that institution? A. Since 1917.

Q. In what capacities?

A. Well, I began as Assistant Cashier, later was Cashier and later, Vice President and when the Trust Department was established, I was named as Manager of the Trust Department and I am Manager of that Department.

Q. You are now and have been, some years, Manager of the Trust Department? A. Yes.

Q. What duties do you have as Manager of the Trust Department of that institution? [6]

A. The usual duties performed by a Trust Officer.

Q. And you are acting as Trustee of the Estate of the late George T. Welsh, deceased?

A. Yes.

Q. Mr. Davis, how long had you known Mr. George T. Welsh prior to 1930?

(Testimony of N. A. Davis.)

A. Well, I have known him ever since 1917.

Q. Has that been an intimate acquaintance?

A. Quite so.

Q. Did he do business with your Bank during those years? A. Yes, a long time before.

Q. He maintained accounts there prior to 1930, with the Bank? A. Yes, he did.

Q. And what conversations, if any, did you have with Mr. Welsh respecting the execution of his last Will and Testament, if any?

Mr. Winter: I object to that as irrelevant and immaterial and it may be an attempt to vary the terms of the Will. The Court must construe the Will from its four corners. This is conversation with a deceased person.

Mr. Sherwood: We are offering it as extrinsic evidence of not what should be the contents of the Will or to vary its terms but merely to show the setting under which the Will was drafted, under the Decisions of our State Supreme Court, showing that not to vary the terms but the setting of the situation surrounding the Testator, so the Court can place itself in the position of the Testator, in construing the [7] Will. I have in mind the particular decisions—particularly In Re Doepke Estate, 182 Washington, 556.

Mr. Winter: There is a lot of difference, in asking for a conversation with a deceased person.

Mr. Sherwood: While we don't admit that there is any great degree of ambiguity about the Will, that term is a relative term in any Will case, par-

(Testimony of N. A. Davis.)

ticularly in a complicated Will of this kind, complicated in its terms and these conversations leading up to the execution of the Will, we believe would throw some light upon the intentions of the Testator, to be gathered from the language of the Will, not for the purpose of varying the terms of the Will, but explaining it.

Mr. Winter: Clearly, from Counsel's own statement, I can see no other explanation than trying to vary the terms of the Will.

The Court: I will reserve ruling on this.

Counsel may proceed with his examination of the witness and it may be considered as an offer of proof, and it is understood all of this goes in over the objection of the Attorney for the Government and that Counsel for the defendants may cross-examine without waiving their right to object.

Mr. Sherwood: That is agreeable, Your Honor.

Q. Mr. Davis, what conversations did you have immediately preceding the execution of this Will, if you had such conversations?

Mr. Winter: And who was present?

Q. Who was present, where they took place and stating the time as near as possible? [8]

A. I think the first conversation I had with Mr. Welsh—he came in to my Desk one day and said he thought of making his Will, or intended making his Will, and wanted to make some trusts for charitable purposes and that he was a little worried about whether he wanted to make the Bank trustee, a little concerned about whether we might get them mixed

(Testimony of N. A. Davis.)

up. He says "There will be about three or four different trusts in my Will. Could you keep that all straight?" I said "We surely could. We handle a good many trusts and each trust is carried absolutely on its own basis." I said "You might make twenty-five trusts, and each would be as separate as though made by twenty-five different men. Come around here and I will show you how we keep our books." So he stepped around where the Trust Register is, looked at it and said "That is all right. That is all right." That is about the conversation had at that time.

Q. That was about when, in relation to——?

A. (Interrupting) About a month before he executed the Will.

Q. He executed the Will about what time, do you recall that date? A. I think it was 1930.

Q. Did you have other conversations with him prior to the time you assumed the duties of Trustee under the Will?

A. Yes, he sent word for me, would I come down to the house.

Q. Did you go to the house?

A. I went to the house.

Q. About what time? [9]

A. Well, the Will was under consideration at that time.

Q. Did Mr. Evans accompany you?

A. Yes, Mr. Evans was down there at the same time.

(Testimony of N. A. Davis.)

Q. Mr. Evans had been the Attorney for the family, some years? A. So I understood.

Q. What conversation did you have at the house and who was present?

A. Mrs. Welsh was present and the reason, particularly, they wanted us at the house, Mrs. Welsh was rather an invalid, tied to the chair, she couldn't get around, and can't yet, so we went down to the house, he explaining about the terms they wanted to put in their Wills, what it would mean, so forth. We stayed there an hour or two that evening, chatted about the matter, explained details to them, explained how they would be handled.

Q. Did he have in mind at that time the specific amounts——?

A. (Interrupting) He didn't say.

Mr. Winter: He is now asking this witness what a deceased person had in his mind.

The Court: This is under the reservation of ruling, is considered an offer and it is not necessary for you to object.

Mr. Winter: Thank you, Your Honor.

Q. Mr. Davis, did he state anything with relation to the specific amounts he wanted to go into the specific trusts that he intended to put into his Will?

A. I don't think he did the first time I was down, but I think I was down again after Mr. Evans had drafted the Will and those items were read over and they wanted to [10] have them read and explained a bit.

(Testimony of N. A. Davis.)

Q. To what extent were you then familiar with the business and family affairs of Mr. and Mrs. Welsh?

A. Well, just the same extent we usually do with customers who are quite intimate with the Bank.

Q. Did you advise them about their investments?

A. No, I couldn't say I advised him; he often came to me and asked me what I thought about this, that or the other; I don't know whether you call that "advice" or not.

Q. Now, did Mr. Welsh discuss with you later, after the Will was executed by him in 1930, the change made by the codicil which was dated in 1931? A. Yes, he did.

Q. What did he say with relation to his codicil before it was——?

The Court: (Interrupting)) So I will understand it, this conversation was when?

Q. When was that, Mr. Davis?

A. It was about the time the codicil was dated, about a year after the Will was drawn, something like that. The reason for that was that he had made a provision in the Will for the Walla Walla Valley General Hospital, I believe is the name, anyhow it was a hospital that had been built largely by subscription there and sort of a community affair and Mr. Welsh felt kindly towards it; later on, it didn't prosper financially and was sold to a religious organization as a hospital for their use and Mr. Welsh told us since it had gone out of the

(Testimony of N. A. Davis.)

community's management, he didn't care to remember it [11] in his Will.

Q. Now, do you know the condition of Mrs. Welsh's health then and at all times subsequent?

A. Well, I know generally, yes, she was——

Mr. Winter: (Interrupting) My objection still goes to this?

The Court: Yes, this is all under reservation of ruling until it is called to the Court's attention that the parties are proceeding on another phase.

A. Well, she was reputedly in rather poor health. She was about 88 years old, 87 or 88.

Q. That was at the time of the death of Mr. Welsh?

A. Yes, at the time of the death of Mr. Welsh.

Q. When did he die?

A. April 15, 1937; I believe he died in 1937, April 15th, I believe.

Q. And you have observed her, personally, through that period of time? A. Yes.

Q. Seen her, more or less, frequently?

A. Yes.

Q. And you have seen her up to the present time? A. Yes.

Q. What is her condition of health?

A. I haven't seen her for some months because she doesn't come out any, she has a representative who talks over her business for her; once in awhile, she talks over the 'phone but it is hard for her to

(Testimony of N. A. Davis.)

talk over the 'phone. She has never been able, as long as I have known her since we first talked about the Will, to walk [12] about the house without someone to help her along on crutches.

Q. Will you state the conversations with Mrs. Welsh at the time you were at the home respecting the husband's Will?

A. After the Will was probated?

Q. Before, when he was talking about drawing it?

A. Oh, she was there in the general conversation and she told me that they were anxious to make the Bank her Trustee because some of her friends had estates handled by the Bank and liked the way it was handled and they were going to make the Bank the Trustee under their Will.

Q. State anything with reference to the nature of the charities they intended to bequeath under their Wills?

A. Help poor people, largely, and boys to get an education, and young folks to get an education.

Q. After the death of Mr. Welsh, have you had any conversations with Mrs. Welsh respecting their trust, this trust? A. Yes.

Q. When and where were these conversations had and who was present? Do you recall the first time you saw her after Mr. Welsh's death?

A. Well, I went down to the house after his funeral and she talked to me about missing him so much and so forth and about she—I don't know as the particular terms of the Will were ever mentioned at that time.

(Testimony of N. A. Davis.)

Q. Later on? A. Yes. [13]

Q. Just state the time and place and the full conversation, who was present?

A. Well, she often sent for me to come to the house, she wanted to talk to me a little bit about one thing and another, said she never had any experience in business, that she has "got to learn now", had me show her how to fix out checks, sign them, one thing and another and she said that part of the property belonged to her, she had helped make it and her property she wanted to arrange to handle, herself, but what belonged to "Papa"—she always expressed it "What belonged to 'Papa' ", she didn't expect to have anything to do with, that was for the Bank to look after.

Q. And did you ever, at any time, as Trust Officer of the Bank, Baker-Boyer National Bank, or the Baker-Boyer National Bank as Trustee through other agents, pay anything except the income from the Welsh Estate to Mrs. Welsh?

Mr. Winter: We will——

The Court: (Interrupting) This is still under reservation of ruling. I haven't been told this is under another phase.

Mr. Sherwood: I will offer that under another phase.

The Court: When you abandon your offer, I will allow Mr. Winter to cross-examine, as he may desire, without thereby waiving any rights he will have, his right to object to the offer being immaterial or

(Testimony of N. A. Davis.)

make such other objections as he wishes as though he had not cross-examined. You may proceed now, if you wish? [14]

Mr. Winter: With the cross-examination?

The Court: On the offer.

Cross Examination

By Mr. Winter:

Q. What business was Mr. Welsh in? What was Mr. Welsh's business? A. He was a farmer.

Q. Farmer?

A. But during later years of his life, he was retired, so far as active farming was concerned, he lived in town, but still rented his farms.

Q. He had considerable property holdings at that time? A. He did.

Q. You would consider him a fairly successful business man, would you? A. Yes.

Q. He was intelligent? A. Yes.

Q. So far as you knew, he had the use of his faculties almost up to the day he died, didn't he?

A. Oh, I think he did, Mr. Winter, at least until a very short time.

Q. Would you say he was an educated man or not?

A. Well, no—yes, in a way; he had attended Business College when he was a young man and he was very careful in making his accounts, in his books he went over, made his entries very carefully, unusually so for a farmer.

Q. And that was true of all his dealings?

(Testimony of N. A. Davis.)

A. I think so. [15]

Mr. Winter: That is all the cross-examination I think I have.

Direct Examination (Cont'd)

By Mr. Sherwood:

Q. Mr. Davis, can you, of your own knowledge, tell the Court whether Mrs. Carrie Welsh has received, out of this trust estate, either from you as Executor or as Trustee anything except the income from the one-half interest in the community estate set aside to you as Trustee?

Mr. Winter: I object to that as irrelevant, immaterial and we call Your Honor's attention to the case of Ithaca Trust Company versus United States where the Supreme Court said—it will not concern itself with what amount the charity actually received afterwards, whether it was used or not; the sole question and the law is well settled by a long line of cases, the only evidence which is admissible relative or material is what was the situation under the terms of the Will at the date of the decedent's death?

Mr. Sherwood: I offer to show the construction the parties, themselves, placed upon the instrument. The record shows from the stipulation and the exhibits annexed that Mrs. Carrie Welsh was at all times represented by her own Counsel, Pettigo, Watson and Goss, and that her own Counsel and she, herself, always placed the construction upon this Will that they had no right to payments except out of income therefrom and I believe under the rules of Evidence, the Court will consider the construc-

(Testimony of N. A. Davis.)

tion [16] placed upon a contract or any writing by the parties, themselves, in reaching a determination as to what construction the Court may want to place. It is not controlling, but it is recognized as an exception to the general rule, as stated in Jones on "Evidence", that "It is merely an aid to the Court, not controlling in any sense."

Mr. Winter: I would like to read what the Supreme Court says about this question. Reading from the decision in Ithaca Trust Company versus United States. (Reads citation.)

The Court clearly points out it isn't what afterwards she decides, that Mrs. Welsh decided not to use any of the corpus of the trust. The fact that charity might get the full amount, which the testator intended to give them is not subject to her will, what she should do with it.

In this case, Mrs. Welsh is not the testator; she is not the one who is making a bequest to charity. The testator is Mr. Welsh, he makes it to her, says "You can use all the corpus and income of that trust if you want it, without making any accounting, even to this man" but if she doesn't use it, then the residue, what she doesn't use, the fact she doesn't use it, is immaterial.

Mr. Sherwood: Under Section 1415 of Remington's Revised Statutes, the rule is as follows: "All courts and others concerned in the execution of a last will shall have due regard to the direction of the will and the true intent and meaning of the testator in all matters brought before them." [17]

(Testimony of N. A. Davis.)

I offer this evidence not to vary the terms of the Will but merely to give the setting and to show the construction placed upon it by all parties concerned, not for the purpose Counsel refers to in the Ithaca Trust Company case.

I realize the test is as of the date of the death but I wish to show the construction placed upon the Will by the parties, including Counsel for Carrie Welsh, and Carrie Welsh, herself, that they did not read the will in a manner which would permit invasion of the corpus; then, it will be for the Court to determine whether or not the Will, itself, according to the intent of the testator, did permit such invasion, which we deny.

The Court: I have heard no authority which says that the Court cannot hear this testimony. Whether the Court should give any effect to it, is something that we will decide later.

The objection is overruled.

Mr. Winter: Note an exception.

Q. Mr. Davis, do you recall the question?

A. I can say, definitely, that no part of the corpus has ever been paid to Mrs. Welsh since the trust came into our hands.

Q. And, Mr. Davis, was or wasn't Mrs. Carrie Welsh represented by Counsel throughout the Estate proceedings?

A. I don't know whether she had Counsel or not at the time the Will was probated but she did before the settlement.

Q. And who were those Counsel?

(Testimony of N. A. Davis.)

A. John F. Watson represented her—I suppose the firm [18] of Pettigo, Watson & Goss, but Mr. Watson was the one.

Q. And are they the attorneys for the First National Bank of Walla Walla and were they at that time? A. Yes.

Q. Does the First National Bank, at Walla Walla, maintain a Trust Department?

A. They did at that time.

Q. And did you have conferences with Mr. Watson regarding the division of this Estate?

A. Oh, yes.

Mr. Winter: We will object to that as irrelevant and immaterial to any issue in this case.

The Court: Overruled.

Q. And, Mr. Davis can you advise the Court the amount of the allowance that Mrs. Welsh received as a widow's allowance in this Estate?

Mr. Winter: I object to that as irrelevant and immaterial.

The Court: Overruled.

A. $300.00 a month.

Q. That was during the pendency of the probate proceedings? A. Yes.

Q. Did you discuss that allowance with her before the amount was allowed by the Court?

A. I don't think I did.

Q. Did she ever ask for more than that during the pendency of the probate proceedings?

A. No, sir, she never.

(Testimony of N. A. Davis.)

Q. Did you have personal knowledge of the standard of living that was followed by Mr. and Mrs. Welsh prior to his [19] death and subsequent to his death by Mrs. Welsh?

Mr. Winter: I want to reserve the same objection.

The Court: The same ruling.

A. To some extent; I was in the household and saw him very frequently.

Q. What did you observe with relation to their usual method of living? A. They were frugal.

Q. And they lived, would you say, modestly?

A. Yes.

Q. Without extravagance?

A. Oh, yes, modestly.

Mr. Sherwood: I would like to have these marked, please, as one exhibit.

The Clerk: This will be plaintiff's exhibit No. 1 marked for identification.

Mr. Winter: They are two different pictures?

Mr. Sherwood: Would you rather have them as two different pictures?

Mr .Winter: I think it would be preferable.

The Clerk: They will be marked plaintiff's exhibits 1 and 2, marked for identification; there are two pictures in each exhibit, Your Honor.

Mr. Sherwood: I believe Counsel has advised me he would not object to our failure to bring the photographer to identify them but reserved his right to object on all other grounds.

Q. Showing you plaintiff's exhibit No. 1 for

(Testimony of N. A. Davis.)

identification, I will ask you if you recognize that building shown on those pictures? [20]

A. Yes.

Q. What building is that?

A. That was the house in which Mr. and Mrs. Welsh lived prior to his death and in which they were living when he died.

A. And did Mrs. Welsh continue to live there, following his death?

A. Only a very short time.

Q. Showing you now what is marked plaintiff's exhibit No. 2 for identification, I will ask you what building is shown in those pictures?

A. That is the house in which Mrs. Welsh is now living.

Q. When did she start to occupy that home?

A. Shortly after Mr. Welsh's death; said she couldn't stay in the old house, she saw Mr. Welsh in every corner.

Mr. Sherwood: We offer plaintiff's exhibits 1 and 2.

Mr. Winter: I object to them as irrelevant and immaterial. I don't object on the ground they have not been identified by the photographer. The witness says they are the house.

Mr. Sherwood: I offer them for the purpose of showing, Your Honor—as some evidence of the manner in which the decedent and the surviving spouse lived.

The Court: Let me see them.

Mr. Sherwood: (Hands exhibits to the Court.)

(Testimony of N. A. Davis.)

The Court: The objections to Exhibits 1 and 2 are overruled. 1 and 2 are admitted.

Plaintiff's exhibits Nos. 1 and 2, the photographs just referred to, admitted in evidence and made a part of the record herein. [21]

Q. Was there ever any demand made upon you, acting as Trustee, or Trust Officer of the Baker-Boyer National Bank, or the Baker-Boyer National Bank as Trustee, for any portion of the corpus of the Welsh Estate?

Mr. Winter: I object to that. It has been asked and answered.

Q. (Continuing) ——by Mrs. Carrie Welsh or anyone acting in her behalf?

The Court: Read the question.

The Reporter: (Repeats the question.)

Mr. Winter: It wouldn't be within this witness's knowledge, it would be hearsay. She may have made a demand on somebody else in the Baker-Boyer National Bank, not a party here.

The Court: I think the question covers a lot of territory.

Mr. Sherwood: I will reframe my thought there. I will withdraw that question.

Q. Mr. Davis, as Trust Officer of the Baker-Boyer National Bank, at all times since the Welsh Will was admitted to probate, and you qualified as Executor and Trustee, you have had individual charge of that estate? A. Management, I would say.

Q. The supervision of it? A. Yes.

Q. And would you or not have had knowledge

(Testimony of N. A. Davis.)

if a demand had been made upon the Bank, as Trustee, for any portion of Mr. Welsh's community interest in the Estate?

Mr. Winter: I object to that as calling for [22] a conclusion of this witness.

The Court: He may say whether he would or not. The objection is overruled.

A. I certainly think I would.

Q. And those matters all have to come across your desk, do they, in the ordinary course of business? A. They do come across my desk.

Q. Assume a demand had been made, would that have reached your desk in the ordinary course of business? A. It would have.

Q. And would there have been anything that would have prevented it or caused it to reach the desk of some other officer of the Bank instead of your own?

A. If I had, it would have come to mine, afterwards.

Q. Those facts being true, Mr. Davis, can you tell the Court of your own knowledge whether or not any demand has been made by Carrie Welsh or anyone acting as her authorized representative for any portion of the principal of the trust?

Mr. Winter: If the Court please, I object to it; by Counsel's own question, he admits it is leading; I object to it on the ground it is leading, putting the answer in the witness's mouth.

The Court: I think so.

(Testimony of N. A. Davis.)

I will say this, further, that the most this witness can say is that the demand was made that he knows of or none was made that he knows of.

Mr. Sherwood: And that if one was made or wasn't made he would know it.

The Court: The most he can say, he thinks he knows [23] it. A. That is right.

Q. Mr. Davis—I will ask the question in a different form, not intending to infringe on Your Honor's ruling—do you know of any demand having been made by Mrs. Welsh or anyone acting in her behalf for the principle of this trust or any portion of it? A. No.

Q. Now, what records does the Baker-Boyer National Bank maintain relating to this particular trust?

A. They keep the usual trust records that are kept by most trust Departments, I think, that are properly managed.

Q. You are required to keep that record by law?

A. Yes, we are by the Federal——

Q. (Interrupting): Now, Mr. Davis, since the inception of this trust, have you maintained accurate records of the income from the trust and of the principal items of property which make up the trust, itself? A. Yes.

Q. Do you have those records with you or photostatic copies of the same? A. Yes.

Mr. Sherwood: I will have this marked, next.

The Clerk: Plaintiff's exhibit No. 3, marked for

(Testimony of N. A. Davis.)

identification, and Plaintiff's exhibits No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, and No. 10, marked for identification.

Q. Mr. Davis, are you, of your own knowledge, familiar with the extent of the property which went to Mrs. Welsh [24] as her community interest in this Estate? A. Yes.

Q. What was that property, the amount of it, approximately? A. About two hundred——

Mr. Winter: (Interrupting): We object to that. The stipulation as to the distribution, decree of distribution, is in evidence.

Mr. Sherwood: I will withdraw it.

The Court: I will sustain the objection.

Q. Do you know, approximately, the income from that undivided half interest of the property Mrs. Welsh has now set aside to her, of the estate?

A. I have no knowledge of the income of it.

Q. It is income-producing properties?

A. Yes.

Q. You are familiar with the extent of the income arising from the trust property of the Welsh Estate?

A. Yes.

Q. Showing you what are marked Plaintiff's Exhibits 3 to 10, inclusive, marked for identification, I will ask you what they are?

A. They are photographic copies of the trust ledger, showing the George T. Welsh testamentary trust from the date it was opened as a trust on our books, on May 8th, 1938, up to January 24th, 1942, just as they show.

(Testimony of N. A. Davis.)

Q. Does that show all of the properties that came into the possession of the Baker-Boyer National Bank as Trustee of the Welsh Estate?

A. Yes.

Q. Together with the income arising therefrom?

[25]

A. Yes.

Q. And, are these records kept under your supervision, direct supervision? A. Yes.

Q. And they have been throughout this period?

A. Yes.

Q. And you are familiar with the items that make up these accounts? A. Yes.

Q. And have knowledge of the entries shown by these exhibits for identification, marked for identification? A. Yes.

Q. And they are true and accurate, to the best of your knowledge? A. They are.

Q. And they were kept in the regular order and procedure of your business? A. Yes.

Mr. Sherwood: I will offer Plaintiff's Exhibits 3 to 10, inclusive.

Mr. Winter: We will object to them, if the Court please, on the grounds they are irrelevant and immaterial—as to what income the trust may have had after the decease, that is not at issue here whatsoever and I would like to further inquire as to the Exhibits before they are received.

The Court: You may look at them.

Mr. Winter: I would like to question the witness with respect to the Exhibits.

(Testimony of N. A. Davis.)

Mr. Sherwood: Before the offer is made, I [26] wish to ask one question.

Q. These are photostatic copies of the original records that you, personally, had made of the records? A. Yes.

Q. And within the last few days? A. Yes.

Cross Examination

By Mr. Winter:

Q. Do you have the original records with you?

A. No.

Q. What do you mean when you say you had them, personally sent them out and had someone photograph them?

A. I carried them out to the photographer.

Q. And told him to photograph them?

A. Told 'her' to.

Q. Do you have a photographer there of your own?

A. No—a public photographer.

Mr. Winter: This witness can't testify she photographed the ones he took out there.

Direct Examination (Cont'd)

By Mr. Sherwood:

Q. Since they were photographed, have you checked them against the originals to see if they were accurate reproductions?

A. Spot-checked them, didn't check every item.

Q. And you have had these photostats in your personal possession and brought them on the train yourself, and they haven't been in the possession of

(Testimony of N. A. Davis.)

the Attorneys [27] until you brought them here today? A. No, sir.

Mr. Winter: Object, that they are not the best evidence.

Q. Have you spot-checked these, each one against the originals? (Indicating)

A. Yes, I did.

Mr. Sherwood: We reoffer them.

The Court: He hasn't said what the result of his spot-check was.

Q. They are accurate reproductions of the originals and complete reportrayals of the originals?

A. Yes, they are.

Mr. Winter: Object to them. They are not the best evidence, if the Court please. The rule is the originals must be in Court.

Mr. Sherwood: I don't believe that rule applies to photostatic or carbon copies.

The Court: Are you objecting for any other reason?

Mr. Winter: Yes, on the ground of immateriality, if the Court please. I will waive my objection to their being copies, if the Court thinks they are material, I won't take the time of the Court to have the case continued for the originals.

The Court: I will not say I think they are material.

Mr. Winter: May I ask one question? They might be material for our purpose. We may waive that objection. [28]

(Testimony of N. A. Davis.)

Cross-Examination (Cont'd)

By Mr. Winter:

Q. Does it show the income monthly to the trust?

A. Shows day by day, every day the entry is made.

Q. On what column does it show the income?

A. (Indicating on exhibit): These are all items —now, here is cash income, debit, credit, balance cash princip*le*, debit, credit, balance; now, this was inventory that came in.

Q. Do you total the yearly income?

A. It shows right here; it is totaled every day. (Indicating on exhibit.)

Q. What is the average daily income, then? I want to know what the income to the trust was by the year, do you know that? A. Yes.

Q. The Exhibit does not show it?

A. It does, yes.

Q. Doesn't show it in the total?

A. No, because taxes, things, are taken out as you go along, if there is any charge to the income you see, and then you will find here—(Indicating on Exhibit.)

Q. (Interrupting): You haven't totaled up the total amount of the income to the trust since you started? A. Yes, I have the figure.

Q. But that isn't shown on the Exhibit?

A. It is shown there (indicating), but you will have to add it; it has been turned over to Mrs. Welsh.

Q. All the income is turned over?

A. All the net income [29]

(Testimony of N. A. Davis.)

Q. All the net income up to that time?

A. Yes. May I show you?

Q. Do you also have her accounts at your Bank?

A. Yes, we do, part of them; she has accounts in various Banks. For instance, here is December 31st. (Indicating on Exhibit.)

Q. I think I understand.

A. Net income $4,514.11; Now, on January 7th, we gave her a check for that amount, see?

Q. Yes.

A. Do you want the total?

Q. No, I just wondered if Your Exhibits show it?

Mr. Winter: We still think the exhibits, in their present form, are irrelevant and immaterial. We will waive any objection to their being copies.

The Court: I am not impressed they are very important, but they might be helpful in arriving at some fact that I might deem material.

I will overrule the objection, admitting Exhibits 3 to 10, inclusive.

> Plaintiff's exhibits 3 to 10, inclusive, photostatic copies of records, last above referred to, admitted in evidence and made a part of the record herein.

Direct Examination (Cont'd)

By Mr. Sherwood:

Q. Mr. Davis, can you refer to Exhibits 3 to 10, inclusive, and advise the Court as to the total amount of the principle of the trust still in the possession and [30] control of the Bank?

(Testimony of N. A. Davis.)

Mr. Winter: The same objection, it is irrelevant, immaterial.

The Court: Overruled.

A. $187,670.76,—is the date closed there. (Indicating on Exhibit.)

Q. That was what date? January 24, 1942?

A. January 24, 1942.

Q. And have you still on hand any net income not paid over to Carrie Welsh?

A. Whatever has been since the 1st of January 1942, yes.

Q. You have paid over all the net income up to the 1st of the year, the year 1942?

A. Yes, that is right.

Q. And did you verify, on behalf of the Baker-Boyer National Bank the Final Account and Report and Petition for Distribution in the Welsh Estate?

A. Yes.

Q. The source of the figures that went into that Account were derived from your books and records, kept in the regular course of business?

Mr. Winter: If the Court please, I think we ought to have the witness testify. Every one of these questions is leading—the witness is always saying "Yes". This is not a divorce calendar. I think the witness should answer.

The Court: You may read the question.

The Reporter: (Repeats the question.)

Mr. Sherwood: I think that is leading, Your Honor. [31]

(Testimony of N. A. Davis.)

The Court: Do you withdraw it?

Mr. Sherwood: Yes, Your Honor.

The Court: All right.

Mr. Winter: We have stipulated, if the Court please, that the Inventory, which was filed as a part of the record—isn't the Inventory part of the record?

Mr. Sherwood: The Inventory hasn't been filed, just the Final Account, but I don't think it is important, anyway.

Q. Mr. Davis, under the Federal Rules, regarding the conducting of a trust, you are required to maintain at all times a copy of any statement rendered to the beneficiary of the trust.

Mr. Winter: I object to that, asking this witness to construe the law for a conclusion of the witness, entirely.

The Court: He may state if he understands——

Q. (Interrupting) Does the Bank maintain, as a part of its permanent records, a copy of the original statements given to the beneficiary of the trust, of each trust that you have there? (Indicating).

A. Yes.

Q. And you have maintained copies pursuant to that Federal Regulation in this trust Estate?

A. Yes.

Q. And how often have you rendered accountings to Carrie Welsh as to the net income from the trust?

A. Once a year, except the first year I believe we rendered it semi-annually, but she said she

(Testimony of N. A. Davis.)

didn't care for it semi-annually, she would rather have it [32] annually, altogether, but she wanted her money twice a year—"never mind about the statement in the middle of the year."

Q. Exhibits 3 to 10, admitted in evidence here, reflect the payment of approximately how much per year?

Mr. Winter: The Exhibits speak for themselves.

The Court: I would just as soon hear it.

Q. For the benefit of the Court?

A. Well, the trust was opened, I think, on May 9th, 1938, and from that time up until December 31st, 1941, which would be less than four years, $28,105.00 was paid to Mrs. Welsh as net income, if I have added it correctly?

Mr. Winter: What is that figure, again?

A. $28,105.00.

Q. And, Mr. Davis, you testified on Counsel's examination, that she maintains, at least, some of her accounts in your Bank? A. Yes.

Q. And, can you apprise the Court as to whether or not that is a substantial account, or those accounts are substantial?

A. Well, we consider them substantial; they run into five figures.

Q. Do you know, of your own knowledge, she maintains accounts in other banking institutions in Walla Walla?

Mr. Winter: Of your own knowledge?

Q. Yes or no?

(Testimony of N. A. Davis.)

A. I don't know what you would consider "my own knowledge"; she told me—— [33]

Mr. Winter: (Interrupting) Have you seen them? A. She told me she had.

Mr. Winter: Your answer is "no", isn't it?

A. Yes. I have to get my knowledge from somebody; I might get it from the institution or from her.

Q. She has an intermediary you advise with, assisting Mrs. Welsh in some of her business affairs?

A. Yes.

Q. And you, from time to time, examine her bank books? A. Yes.

Q. In other banks as well as your own?

A. No.

Mr. Winter: Counsel is leading the witness in every question.

The Court: He led the witness but, in this particular instance, the witness didn't follow him.

Mr. Winter: I wasn't listening to the answer.

The Court: He tried to lead the witness.

Mr. Sherwood: *I* wasn't my purpose to lead; I was trying to shorten this up.

Q. Mr. Davis, do you recall the facts relating to the partition of the Estate, what led up to that partition?

A. You mean, the division of the Estate?

Q. Yes.

A. Yes, that is our duty to divide it, as the Executor.

(Testimony of N. A. Davis.)

Q. And the Bank caused to be appointed three Commissioners to appraise the property before that division was consummated? [34]

A. The Bank didn't appoint them, no.

Q. Caused the Court to appoint them?

A. I don't know "caused the Court", the Court——

Q. (Interrupting) You petitioned for the disposition of the properties? A. Yes.

Q. Now, there was an additional State tax assessment forwarded to the Bank as Executor some time following the original assessment, Mr. Davis?

A. Yes.

Q. And before paying the additional State tax assessment, were you endeavoring to make a compromise with the Government?

Mr. Winter: I object to that as irrelevant and immaterial. The facts have all been stipulated with respect to the assessment, when it was paid, who paid it.

The Court: What was the purpose?

Mr. Sherwood: For the purpose of explaining the order that was entered on March 29th, 1940, in the Probate Cause relating to the State tax; I offer it to show that we endeavored to compromise with the Federal Government about that time and we couldn't get the State to fix the tax, so that we could take our deduction for State Inheritance Tax from the Federal tax and we were trying to work it out, between the two Departments, and that finally led up to the Court proceedings resulting

(Testimony of N. A. Davis.)

in the Order of March 29th, 1940, and this is a preliminary question, showing there were negotiations for compromise pending at that time. [35]

The Court: How long is your case going to take?

Mr. Sherwood: This witness, and one short witness, that is all.

The Court: I will overrule the objection.

Q. Were there compromise negotiations pending with the Federal and State Tax Officials just prior and subsequent to the additional assessment of taxes by the Federal Government?

A. There was a compromise pending with the technical staff.

Q. What was the first notification you received of that additional assessment?

A. From the State?

Q. From the Federal Government?

Mr. Winter: I object to that. The assessment shows on its face.

A. I don't remember the date.

The Court: The objection is withdrawn, isn't it?

Mr. Winter: Yes, Your Honor.

Q. What steps, if any, did the Bank take through you to obtain settlement of the Inheritance Tax due the State of Washington about that time?

Mr. Winter: I object to that as irrelevant and immaterial.

The Court: Read that question?

(Testimony of N. A. Davis.)

The Reporter: (Repeats the question.)

The Court: You object to that?

Mr. Winter: Yes, Your Honor. [36]

The Court: I make a reservation of ruling as to this and you may proceed to interrogate him with the right of the defense Counsel to cross-examine, without waiving thereby his objection.

Q. Mr. Davis, the State Inheritance Tax carried 8 percent interest and the Federal 6 percent interest—does that refresh your recollection?

A. That is my recollection of it, yes.

Q. And did you, through Mr. Evans, the attorney for the Estate, negotiate with the Washington State Inheritance Tax Division for a settlement of the State Tax about the time of this additional assessment by the Federal Government?

A. We were very anxious to get the tax settled.

Q. To save interest?

A. To save interest and get a settlement.

Q. Did you receive a letter from the Inheritance Tax Escheat Division, which is in evidence here attached to the stipulation?

Mr. Winter: That was for the purpose of showing——

The Court: (Interrupting) We will take a five-minute recess.

(Short recess)

Q. (Continuing, by Mr. Sherwood.) I referred to "Exhibit L" attached to the stipulation just prior to the Recess.

(Testimony of N. A. Davis.)

The Court: This was all under the reservation of ruling; when you finish this offer by testimony, you advise the Court and I will give Mr. Winter the opportunity to cross-examine.

Q. I refer to Exhibit L annexed to and made a part of the [37] stipulation filed in this proceeding. Did you receive that, or was that called to your attention by the Attorney for the Estate?

A. I think, maybe, it was; we didn't receive it, no, not from the State.

Q. It was called to your attention?

A. Yes.

Mr. Winter: I might point out to the Court that is part of the stipulation, for the purpose of showing payment of the State of $6.07 and for no other purpose, according to the stipulation.

Q. The amount of taxes paid the State of Washington is how much?

Mr. Winter: That is shown on the Exhibit, admitted by the stipulation to show that payment.

Q. Now, Mr. Davis, the total deductions claimed in your state tax return, which is a part of the stipulation and the exhibits annexed thereto, total $7,942.82, made up of the following items: Funeral Expenses——?

Mr. Winter: (Interrupting) We object to the deductions.

The Court: This is under the offer of proof.

Mr. Winter: I withdraw it, then.

Mr. Sherwood: Then, I will defer asking that

(Testimony of N. A. Davis.)

question, Your Honor, until after he examines under my offer of proof.

Mr. Winter: Have you finished your offer of proof?

Mr. Sherwood: Yes, relating to Exhibit L.

The Court: What was your purpose? [38]

Mr. Sherwood: The purpose of offering L, that a controversy existed between—prior to the entry of the order of March 29, 1940, which was commented upon by Counsel in his opening statement, which Order was entered in the Welsh Estate probate proceedings in fixing the additional State Inheritance tax and that explains the entry of that Order at a date following the entry of the decree of distribution.

The Court: All right, you may cross-examine, if you please, without waiver.

Mr. Winter: We will rely on our objection. No cross-exmination of that issue.

The Court: All right.

Q. (By Mr. Sherwood, continuing Direct Examination.) Mr. Davis, the total deductions claimed in the State tax return, which is a part of the stipulation and exhibits annexed thereto, is $7,942.82, made up of the following items: Funeral Expense, $290.27; Executor's fees, $2,750.00; Attorney's fees, $2750.00; Miscellaneous Administration Expense, $138.46; Claims filed in the Estate, $214.09; support of surviving widow, $1800.00—I will ask you if those items were all bona fide expenses of the Estate?

(Testimony of N. A. Davis.)

Mr. Winter: I object to that as irrelevant and immaterial, there is no issue here as to whether or not any other deductions other than—or claim for credits other than the two amounts which are alleged to have been donated to charity or given to charity under the Will. The plaintiff, by his claim of refund and by his suit made no other issue as to whether or not [39] the Commissioner erred in any other items.

The Court: Is that the purpose?

Mr. Sherwood: The burden is on the taxpayer in these proceedings to establish the amount of tax that may be due and I offer to show those are bona fide deductible expenses of the Estate, shown on the state tax return and if he admits we are entitled to those deductions, I won't have to prove them.

Mr. Winter: We admit he is entitled to every deduction allowed by the Commissioner as shown on the assessment list.

The Court: Did the Commissioner allow those deductions?

Mr. Sherwood: Tentatively.

The Court: He now admitted you are entitled to all deductions which the Commissioner allowed.

Mr. Winter: Only tentative allowance—first, he allowed over $1,000 tentatively as a payment to the State; that was later reduced to the amount actually paid of $600.00, an additional tax assessed for that amount not here in issue.

(Testimony of N. A. Davis.)

The Court: The deductions of the Commissioner allowed, you concede are proper?

Mr. Winter: Yes, Your Honor.

The Court: Is there any necessity for this testimony, then?

Mr. Sherwood: There isn't now.

Mr. Winter: The burden of proof is on the plaintiff to show these specific amounts we are talking about are allowable deductions; that is the only issue.

Mr. Sherwood: You may cross-examine. [40]

Cross Examination

By Mr. Winter:

Q. I think you stated, Mr. Davis, that Mrs. Welsh now has a manager or a financial adviser?

A. No, I think that was Counsel; she has a financial adviser, I would say.

Q. Do you know who that is? A. Yes.

Q. Who is it?

A. Nettie Galbreath, Principal of St. Paul's School, lives across the Street; she has been a friend of theirs many, many years, of the family.

Q. Does she live with Mrs. Welsh?

A. No.

Q. Who does Mrs. Welsh have taking care of her? A. A housekeeper.

Q. And nurse?

A. At times; I think mostly a housekeeper and she has a doctor who comes to see her every few days.

Q. More than one doctor, or several?

(Testimony of N. A. Davis.)

A. I think one, as far as I know.

Q. You said she moved out of the house. That is, the old homestead? A. Yes.

Q. Shortly after? A. Yes.

Q. In the partition, without looking it up, who got the old homestead? Was that part of her half of the community?

A. Mr. Winter, the old homestead was sold before the [41] estate was closed and Mrs. Welsh signed the contract, along with the Executor to show she approved it,—on installment payments, because it shouldn't stand there idle, you know.

Q. How long after Mr. Welsh's death would you say approximately? You said "a short time", what do you mean by "a short time"?

A. She moved.

Q. Yes, a month or two months or years?

A. No, within two months, I am quite sure.

Q. Did she build this new house?

A. No, she bought it.

Q. Did she come to you for the money to buy this house, as trustee?

A. Yes, not as trustee, executor at that time, she says "You must buy that house", we talked to the Judge about it, he said there was plenty of money there and if it would help Mrs. Welsh to be more satisfied to go ahead and buy it and he would approve it; she approved and o. k.'d it and she took it as a part of her distribution for what we paid for it, $5550.00.

(Testimony of N. A. Davis.)

Q. You say you have been advised she has accounts in other banks? A. Yes.

Q. Other investments?

A. Yes, Miss Galbreath told me she had.

Q. Has she a safety deposit box in your bank?

A. I think not.

Q. You don't know whether she has in some other bank? A. I couldn't say. [42]

Q. Are you at all familiar with her investments, personally?

A. Mr. Winter, I am familiar with all the investments that went to her from the estate, of course, and I doubt very much if she has made much investments since.

Q. I didn't ask you if you "doubted"—do you know of your own knowledge? A. No.

Q. You wouldn't know to what extent they would have been, of course? A. No.

Q. You don't act as her financial adviser?

A. No, sir.

Q. You don't know of your own knowledge whether she has used all of the income for her own support, do you?

A. No, I don't, of my own knowledge.

Q. You don't know how much of her own separate property she has had, she used?

A. I know she has the ranches yet.

Q. Do you know of your own knowledge? Have you seen the deeds? Examined the records to them?

A. I know she got them and it would come to my knowledge if she passed them out.

(Testimony of N. A. Davis.)

Q. That is the only reason you know she has got them? A. Yes.

Q. You don't know what encumbrances she has got on them, of your own knowledge?

A. We see a copy of the records every day.

Q. And you look at them? That is your only knowledge? A. No. [43]

Q. If she had been given mortgages and hadn't recorded them, you wouldn't know, would you?

A. No, sir.

Q. You don't know whether she deeded all her property away, her separate property to her children and not recorded it?

A. I know she deeded one place that Mr. Welsh bequeathed his half interest to his son and she turned around and deeded her half right away to him. That is a small place, small in value.

Mr. Winter: That is all.

Redirect Examination

By Mr. Sherwood:

Q. That is the piece of property mentioned in Mr. Welsh's will as being the real estate he wanted his son to share in?

A. Yes, it was bequeathed to him in his will, his half interest.

Q. And she deeded her half interest to him following Mr. Welsh's death? A. Yes.

Q. The consideration for the new house was $5500.00?

Mr. Winter: That is leading the witness.

(Testimony of N. A. Davis.)

A. I just said that, in answer to your question, Mr. Winter.

Mr. Winter: I am not talking to Mr. Davis.

The Court: Sustained.

Q. Mr. Davis, could you tell me what the old house sold for, of your own knowledge? [44]

A. Yes.

Q. How much?

A. $3600.00, including the carpets on the house, afterwards valued at $200.00, considering the real estate $3400.

Q. And there were no mortgages on any of the real estate property at the time it came into your possession? A. No, sir.

Mr. Sherwood: That is all.

(Witness Excused)

MRS. HOWARD MULLEN,

called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Sherwood:

Q. State your full name, please?

A. Mrs. Howard Mullen.

Q. Where do you live?

A. 910 Hobson Street, Walla Walla.

Q. Did you know Mr. George T. Welsh in his lifetime?

A. Yes, I did, I knew him the last four years.

(Testimony of Mrs. Howard Mullen)

Q. And did you know Mrs. Welsh?

A. Yes, I know her.

Q. Did you reside in their home? A. Yes.

Q. During what period?

A. The last four years of Mr. Welsh's life.

[45]

Q. And did you reside there following his death?

A. For about two weeks.

Q. And, will you tell the Court, from your observance of the manner of their living there and the home, what standard of living they observed?

A. They lived very—

Mr. Winter: (Interrupting) I object to that as irrelevant and immaterial.

The Court: Overruled.

A. (Continuing)—modestly, very conservative; had what they wanted but they weren't extravagant.

Q. And what was Mrs. Welsh's general condition of health at the time of Mr. Welsh's death?

A. She was very poorly.

Mr. Winter: That is a conclusion. This witness is not qualified to testify to a person's health. She can testify to the facts, what she observed.

The Court: I think a layman, who lived in the house four years, is qualified to testify as to the health of a resident of the house. The Court is not required to accept their judgment as controlling.

The objection is overruled.

Q. What did you observe as to her general condition of health at that time?

(Testimony of Mrs. Howard Mullen)

A. She was very poorly, wasn't allowed to walk around home alone, we had to help her whenever she walked anywhere.

Q. For the four years previous to the time you left there? When you first went there, what was the condition of [46] her health?

A. She was poorly then.

Mr. Sherwood: I think that is all. (Witness excused)

Mr. Sherwood: Is there any question about the nature of this Methodist Foundation, as a proper——?

Mr. Winter: (Interrupting) The Commissioner made no issue—as a charitable institution, merely as to the amount and——

The Court: (Interrupting) It is conceded then——?

Mr. Winter: (Interrupting) They are a charitable institution.

The Court: This is a charitable institution?

Mr. Winter: Yes.

Mr. Sherwood: That is public charity, within the meaning of the Act, that is as to the old, aged and poor people and worthy young people that are provided for under the will?

Mr. Winter: I don't understand—the will speaks for itself; we are not offering any evidence to controvert it, on that point, I am not conceding every one to whom the trustee pays may be charity, but the Commissioner has made no issue of it, it is merely on the grounds that I have no evidence on it.

Mr. Sherwood: Then, let me understand, the burden is on us to prove——?

The Court: (Interrupting) I understand that, as far as the organization——? [47]

Mr. Winter: (Interrupting) As far as the bequest to charity is concerned, the Government made no issue that they are not bequests to charity, if they are specific and come within the terms of being in an amount certain and passing as such at the time of the testator's death.

The Court: Well, assuming you are not making any objection, are you conceding it?

Mr. Winter: We are conceding it.

The Court: You concede those are charities?

Mr. Winter: As such, yes, both items.

Mr. Sherwood: Then I withdraw this witness.

Thank you, Reverend Sprague.

(Witness leaves the Stand.)

Mr. Sherwood: I will call Mr. Evans.

MARVIN EVANS,

called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Sherwood:

Q. Your name is Marvin Evans? A. Yes.

Q. What is your profession?

A. Attorney-at-Law.

(Testimony of Marvin Evans.)

Q. How long have you practiced law, as a member of the Bar of the State of Washington?

A. Ever since 1894. [48]

Q. Mr. Evans, you were well acquainted with George T. Welsh in his lifetime? A. Yes.

Q. And acted as his attorney for sometime?

A. Yes.

Q. For how many years?

A. Well, I would have to estimate that; I kept no record of it. I suppose, 10, 12, 15 years, something like that.

Q. And you were, of course, acquainted with Carrie, his wife? A. Yes.

Q. You were in and out of their home, I assume?

A. Yes.

Q. And they were at your office on occasions?

A. I mean him, but not Mrs. Welsh.

Q. Now, just prior to 1930, the date when this will was executed by Mr. Welsh, did you have some preliminary conversations with Mr. Welsh and Mrs. Welsh regarding the will? A. Yes.

Mr. Sherwood: I assume you want to make the same objection?

Mr. Winter: Not to that question, we have no objection.

Q. You drew this will which is in evidence here as a part of the stipulation? A. I did.

Q. And you were advised by Mr. Welsh of the nature and extent of his properties? [49]

Mr. Winter: I object to that—but, I will withdraw that objection to the question, and object to

(Testimony of Marvin Evans.)

it on the ground it is leading. He doesn't have to lead Mr. Evans, I am sure.

The Court: It is leading, but I will let it stand.

A. What is the question?

Q. Were you acquainted with the extent of their community property holdings?

A. I knew about their lands definitely; I didn't know all about their securities, like bonds and stocks; I didn't know all about them.

Q. Mr. Evans, will you just briefly tell the Court what lands were owned, what the nature of the lands owned by them was in 1930?

A. Chiefly, farmlands.

Q. Wheat-growing lands? A. Yes.

Q. Would they be income yielding properties?

A. Yes.

Q. Substantial income? A. Yes.

Q. And Mr. Welsh had been a wheat farmer for most of the years of his life there in Walla Walla Valley?

Mr. Winter: I object to that as leading and the witness only knew him for ten or fifteen years.

A. I have known them for many years, transacted business with them 12 or 15 years.

The Court: The objection is overruled. I will let him answer. [50]

I might say, Counsel, that any time you get a question that you really wish answered, because you deem it is important, the less leading the question is the more persuasive the answer will be.

Mr. Sherwood: I realize that, Your Honor.

(Testimony of Marvin Evans.)

The Court: All right.

Q. Now, Mr. Evans, what conversation did you have jointly with Mrs. Welsh and Mr. Welsh prior to the drawing of Mr. Welsh's will? who was present and when did it take place?

Mr. Winter: I object to it.

The Court: You are objecting to this conversation?

Mr. Winter: Yes, Your Honor.

The Court: I will make the same reservation of ruling on this phase that I made as to Mr. Davis' examination.

A. In the first instance——

The Court: (Interrupting) Reservation of ruling on a deemed offer of proof.

A. In the first instance, Mr. Welsh came to my office and said in substance that he and Mrs. Welsh intended to make their wills and wanted me to come down and discuss the matter with them. A date was agreed upon and I did go down to the house and had a conference with both Mr. and Mrs. Welsh, all three of us being in the room at the same time and present.

Q. Now, how long was that before the will was executed?

A. Well, I think that it was approximately a month.

Q. Now, Mr. Evans, did Mr. Welsh—just tell what Mr. Welsh [51] told you in the presence of his wife there at that time?

A. Of course, I can't repeat his language; I can

(Testimony of Marvin Evans.)

repeat the substance of his language. He told me in her presence that they wanted to will—he wanted to will his estate in trust; he told me the beneficiaries to be made of the trust; he told me the amounts that he had decided upon to give to the beneficiaries of these trusts.

Q. Did he tell you of his intentions regarding his grandson and son as to the specific amounts that he wanted to go to them?

A. Well, as to his son, he wanted to give to his son his community half in a certain property lying between Walla Walla and Lowden, subject, however, to a life estate in the property to Mrs. Welsh as long as she lived.

Q. And to the grandson?

A. Well, now, of course, that is the son—I didn't complete that. He wanted to will him the income on $30,000.00 during his lifetime, subject to the life estate in Mrs. Welsh.

Q. And, as to the grandson?

A. The same provision, only the amount was $12,500.00.

Q. He seemed to have those amounts definitely in mind at that time, did he?

A. He did.

Q. Did you discuss with him the amounts that would go to the trust?

A. I, of course, didn't know how much the amounts would be, [52] that would depend upon the size of his estate.

(Testimony of Marvin Evans.)

Q. Did he seem to have a complete knowledge of the extent of his estate, and did she?

A. Of course, I had quite an extensive knowledge of his estate, myself, other than more or less details as to stocks and bonds I didn't know.

Q. Did they seem to have an appreciation of the extent of their estates? A. Yes.

Q. Both of them?

A. Apparently, as far as I could see.

Q. Now, Mr. Evans, I will ask you if at any time during the probate proceedings, upon this estate, Carrie Welsh, or anyone acting in her behalf, including her attorneys, Pettigo, Watson & Goss, ever made any contention, demand for any part of the corpus or the principal of the undivided community interest of Mr. Welsh? A. No.

The Court: This is still in your reservation of ruling?

Mr. Sherwood: Yes.

Q. And did Mrs. Welsh or her attorney or anyone acting in her behalf ever in writing or orally approach you as Attorney for the Estate, for the purpose of obtaining any portion of the principal or corpus of the George T. Welsh trust estate?

A. No, sir.

Q. And, did Mr. Watson, of counsel for Mrs. Welsh, prepare or assist in the preparation of the stipulation which is in evidence here as a part of the original stipulation [53] filed in this proceeding?

A. He and I together worked it out.

(Testimony of Marvin Evans.)

Q. And did he take the acknowledgment of Mrs. Carrie Welsh on that stipulation?

A. He did.

Q. Was there any discussion between you attorneys acting for—you, acting for the estate, executor and trustee, and Mr. Watson, acting for Mrs. Welsh, regarding the estate taxes at the time that the stipulation was drawn?

A. Well, as I understand your question, I don't recall that there was.

Q. And, did you have in mind, when you prepared that stipulation,—you, acting for the estate, that it had behind it any purpose to affect the amount of the estate taxes?

A. I realized, of course, there would have to be estate tax and estate inheritance tax upon the residue of Mr. Welsh's half.

Q. But when you prepared the stipulation, did you prepare the stipulation for the expressed purpose of affecting the amount of the tax?

A. Yes, in order to determine what the property was going to be.

Q. In order to determine—? what property would be?

A. What property would be decreed to the Welsh estate and what property would be decreed to Mrs. Welsh.

Q. But when you prepared the stipulation, you didn't prepare it for the purpose of affecting, reducing the estate taxes? It was merely for a partition? [54] A. Yes.

(Testimony of Marvin Evans.)

Q. And did you follow the statutory procedure in effecting that partition? A. I did.

Q. Were Commissioners appointed?

A. They were.

The Court: This witness answered a question, when you put it to him as a question, one way—you gave a very leading question and he answered it the other way.

Mr. Sherwood: Your Honor, I think that he had one thing in mind and I had another at the time he answered the first time—I just wanted to ask it over again to straighten it out so that the fact would be brought out.

The Court: If there is any seeming contradiction in the two answers, I have already indicated to you which answer is apt to be the more persuasive.

Mr. Sherwood: I don't think he understood my question the first time, Your Honor. He was looking upon it as a lawyer, rather than as a factual matter. I think he said, of course an estate tax was due, that would affect the estate tax, the stipulation; I wanted to bring out the stipulation wasn't prepared, we having anything in mind about reducing it through the stipulation.

The Court: Counsel, you make it very difficult for the Court, if you think he doesn't understand the question and are hoping for a different answer; I think the clarifying question should not be leading. [55]

Mr. Sherwood: I didn't intend it as such. I just wanted to straighten the witness out.

(Testimony of Marvin Evans.)

Q. Mr. Evans, would you advise the Court the true answer, the fact as to the matter of the preparation of the stipulation in relation to the matter of estate taxes?

A. Well, if I get your question, when we prepared the stipulation—let the hammer fall where it would, where it might, whenever it came to the George T. Welsh Estate, of course there would be a tax to be paid on that and likewise—on that, yes.

Q. And that that went in trust for charitable purposes, you considered would not be subject to the estate tax?

A. I didn't so understand it; I thought, wouldn't be subject to a tax.

Q. And that procedure wasn't initiated, the use of the stipulation, to evade a tax?

A. No, sir, no, not part of that, anyway.

Q. Now, Mr. Evans, could you tell the Court whether or not Mr. and Mrs. Welsh lived extravagantly or otherwise?

A. They lived economically; they lived plainly, but they were quite conservative and frugal.

Mr. Sherwood: I think that is all.

Mr. Winter: No cross-examination.

A. (Volunteering) There is on question you didn't ask me about, that was taken up with me by Mr. Welsh—

The Court: (Interrupting) I would suggest that you talk with Counsel privately and then if there is a question to be asked, that he ask it.

A. All right. [56]

(Testimony of Marvin Evans.)

Mr. Winter: Then I withdraw my waiver of cross-examination, Your Honor.

Mr. Sherwood: That is all, Your Honor.

Mr. Winter: No cross-examination.

(Witness Excused)

Mr. Sherwood: If all the Exhibits are offered and received in evidence, we rest.

The Court: All of the Exhibits offered, have been received in evidence.

Mr. Winter: If the Court please, I would like to have marked for identification as defendant's exhibit——

The Clerk: Interrupting "A", marked for identification.

Mr. Winter: The purpose is to refute any inference with respect to the—I only offer it in rebuttal to the evidence. It is an offer of proof with respect to a compromise before the Technical Staff. I don't know the purpose of the testimony offered but it is to rebut any and it is also in compliance with your subpoena served upon the Government to produce the Technical Staff Report; that is a waiver of restrictions and consent to the *assets*.

There was some question, the date of the tax was waived and the tax was assessed, as to whether or not it was prior or subsequent to the filing of the petition in the Superior Court.

We will offer in evidence Government's Exhibits A and B, certified copies of the waiver of restriction [57] against immediate assessment of tax and

memorandum, Technical Staff, in the Estate of George T. Welch, deceased.

Mr. Poe: Mr. Winter, is that for the purpose of answering the allegation of the complaint, that the plaintiff had no opportunity to go before the Board of Tax Appeals in relation to the last assessment made against the taxpayer?

Mr. Winter: Shows tentative allowance allowed with respect to the estate and in answer, also, to the date of conference with the Technical Staff, being prior to 1940, at the time you filed your petition in the State Court and shows the date of the assessment.

It is in rebuttal to your evidence.

Mr. Poe: We have had our day in Court, so we don't mind that last deficiency being given without a 90-day letter, which was assessed without such a letter.

Mr. Winter: That is consent of the assessment and shows the basis of the assessment, based upon an agreement reached before the Technical Staff.

The Court: Exhibit A and Exhibit B are offered?

Mr. Winter: Yes, Your Honor.

The Court: Any objection?

Mr. Poe: No objection.

The Court: Exhibits A and B are admitted.

Defendants' Exhibits A and B, the documents last above referred to, waiver of restriction [58] against immediate assessment of tax and memorandum, Technical Staff, admitted in evidence and made a part of the record herein.

DEFENDANT'S EXHIBIT A

(Cut)

United States of America
Treasury Department
Washington

January 29, 1942.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Pacific Division, Technical Staff Action Memorandum dated December 28, 1939, (with supporting statement atttached), to Internal Revenue Agent in Charge, Seattle, Washington, signed by Virgil Bean, Head of Division, in re: Baker-Boyer National Bank of Walla Walla, Washington, Executor, Estate of George T. Welch, Deceased, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal] F. A. BIRGFELD,
Chief Clerk, Treasury De-
Department.

MW WWB Amr BM SSF JPW H

Post-Reviewed March 13, 1940
C-TS:PD
S:WWB

BUREAU RECORD

Pacific Division, Technical Staff
Action Memorandum

In re Conference Report dated June 17, 1939
(MT:ET-2125-Washinton) T.S. No. E-2

Taxpayer:

Estate of George T. Welch, Deceased,
Baker-Boyer National Bank of Walla Walla, Washington, Executor.

Represented by:

Cameron Sherwood,
Marvin Evans,
Walla Walla, Washington.

Burns Poe,
Tacoma, Washington.

Collection District: Washington.

Date of Death	Kind of Tax	Deficiency found by I. R. Agt. in Chg.	Limitation
April 15, 1937	Estate	$21,417.55	March 17, 1941

International Revenue Agent in Charge,
Seattle, Washington.

I return herewith the file relating to the above-described case, accompanied by a statement which embodies a proposal for closing the case. This statement has my approval and is incorporated as a part of the record of the case. The Staff Division has reached the following—

DECISION:

The finding of the Internal Revenue Agent in Charge in this case, as set forth above, is sustained.

The taxpayer accepts the foregoing determination, as set forth in the accompanying agreement, which waives the statutory restrictions on assessment and collection.

Appropriate action should be taken under the provisions of paragraph 7 of the Commissioner's memorandum establishing this Division.

By direction of the Commissioner:

VIRGIL BEAN
Head of Division.

(Margin Notation)—3/22/40 No. 81 in evidence.

W.W.B. 12/21/39
J.B.H. 12/21/39
Date: Dec. 29, 1939
Case examined 3-22-40 AWN

Pacific Division, Technical Staff
Supporting Statement

In re Conference Report dated June 17, 1939 (MT:ET-2125-Washington) T.S. No. E-2

Taxpayer:

Estate of George T. Welch, Deceased,
Baker-Boyer National Bank of Walla Walla, Washington, Executor.

Represented by:

Cameron Sherwood,
Walla Walla, Washington.

Burns Poe,
Tacoma, Washington.

Collection District: Washington.

Date of Death	Kind of Tax	Deficiency found by I. R. Agt. in Chg.	Limitation
April 15, 1937	Estate	$21,417.55	March 17, 1941

Head of Division:

The above-entitled case, referred to the Pacific Division of the Technical Staff at the request of the taxpayer, has been considered by the undersigned.

In response to requests conferences were granted at Seattle, Washington, on August 25 and 28, September 1, 8 and 27, October 4 and 12, November 1, and December 5, 1939, for the purpose of reaching a settlement of the case. At the conference on August 25, Burns Poe and Marvin Evans, attorneys, and N. A. Davis, Vice President of Baker-Boyer National Bank of Walla Walla, represented the taxpayer, while at each of the subsequent conferences Mr. Poe appeared alone.

The issue in the case is the amount, if any, of the deduction to which the taxpayer is entitled for charitable, public, religious, educational, etc., bequests.

As the result of the conferences so held the taxpayer has submitted a signed form 890, waiver of restrictions against immediate assessment and collection of deficiency in estate tax, in the amount of $21,417.55 as determined by the Internal Revenue

Revenue Agent in Charge. This amount was computed on the basis of a tentative allowance of the credit provided for in section 301 (c) of the Revenue Act of 1926 as amended, for Washington State Inheritance Tax, subject to proof of payment thereof. It appears that determination of liability of the estate for State Inheritance Tax is being deferred pending final determination of liability for Federal estate tax. [Marginal Notation: Charity disallowed.]

It is understood to be the purpose of the taxpayer to pay the amount of the deficiency, together with interest thereon as provided by law and, in due course, to file a claim for refund of all or a portion of the amount paid.

WALTER W. BOND
Assistant Technical Advisor.

[Endorsed]: Filed 2/3/42

DEFENDANTS' EXHIBIT B

(Cut)
United States of America
Treasury Department
Washington

January 29, 1942.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of

Waiver of Restrictions Against Immediate Assessment and Collection of Deficiency in Estate Tax in the sum of $21,417.55, dated December 12, 1939, filed by Estate of George T. Welch, Baker-Boyer National Bank of Walla Walla, Executor, Walla Walla, Washington, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury.

[Seal] F. A. BIRGFELD,
Chief Clerk, Treasury Department.

MW WWB Amr BM SSF JPW H

C-PD:TS
S:WWB

In re: Estate of George T. Welch Baker-Boyer National Bank of Walla Walla, Executor, Walla Walla, Washington

Waiver Of Restrictions Against Immediate Assessment And Collection of Deficiency in Estate Tax

Received Dec. 29, 1939, Technical Staff Pacific Division Seattle Office.

MT-ET-
District of

Pursuant to the provisions of section 308(d) of the Revenue Act of 1926, the undersigned executor or administrator of the estate of George T.

Welch, Deceased, waives the restrictions provided in section 308(a) of the Revenue Act of 1926, and consents to the assessment and collection of a deficiency in estate tax in the sum of $21,417.55, together with interest thereon as provided by law.

On or about October 31, 1939, the Collector of Internal Revenue, Washington District, was given by the undersigned a check for $8,452.46 in payment of an expected deficiency in an estate tax of $7845.29 and interest amounting to $609.17.

This waiver is signed upon the understanding that the Collection shall credit the said payment on the said deficiency in estate tax of $21,417.55.

Assessment Section Sales Tax Division

Date Waiver Checked 1-15-40. Date of Death 4-15-37. Add'l Int. Assessed $..... List..... Page..... Line..... Clerk (Illegible).

Assessment Section Sales Tax Division

Date Waiver checked 2-16-40. Date of Death 4-15-37. Add'l Int. Assessed $..... List..... Page..... Line..... Clerk (Illegible).

[Stamped] Bureau Record.

Estate of George T. Welch Baker-Boyer National Bank of Walla Walla, Executor

By: N. A. DAVIS, Vice President

(Executor or administrator)

Date December 12, 1939. Walla Walla, Wash.

(Address)

Note.—This waiver does not extend the statute of limitations for refund or assessment of tax, and is

not an agreement as provided under section 606 of the Revenue Act of 1928. The submission of the waiver will not prejudice the right to file a claim for refund of any portion of the tax, but will expedite the settlement of the case and will reduce the accumulation of interest, as the regular interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier.

[Endorsed]: Filed 2-3-42.

Mr. Winter: The Defendants rest, Your Honor.

The Court: Is there any rebuttal?

Mr. Sherwood: None, Your Honor.

The Court: Is there any reason you should not present written argument and later, briefly, oral argument on the point?

How much time would you like for your written argument?

Mr. Poe: Twenty days—would that be too many?

Mr. Winter: That is satisfactory with me, Your Honor.

The Court: Mr. Poe twenty days and twenty days by Mr. Winter.

Counsel for plaintiff may have twenty days in which to serve and furnish the Court with the opening written argument; the Government may have until forty days from now, in which to serve and furnish the Court with its answering written argument, and Counsel for plaintiff may have

until forty-five days from today in which to serve and furnish the Court with written reply argument. Ten days after plaintiff's reply written argument has been furnished to the Court, either party may, on the first Monday in Seattle thereafter the Court is present, request the Court to fix the time for oral argument, each side being entitled to thirty minutes oral argument and such additional oral argument as the Court may request. [59]

In other words, I have to listen to you for thirty minutes a side. I may desire to hear for you much more extensively. Is that satisfactory, Gentlemen?

Counsel: Yes, Your Honor.

(Adjournment)

[Endorsed]: Filed Feb. 24, 1942. [60]

[Endorsed]: No. 10409. United States Circuit Court of Appeals for the Ninth Circuit. Thor W. Henricksen, formerly Acting Collector of Internal Revenue for the District of Washington, and Clark Squire, Collector of Internal Revenue for the District of Washington, Appellants, vs. Baker-Boyer National Bank, a corporation, Executor of the Estate of George T. Welch, deceased, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed April 26, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No 10409

THOR W. HENRICKSEN, formerly Acting Collector of Internal Revenue for the District of Washington; and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellants,

vs.

BAKER-BOYER NATIONAL BANK, a corporation, executor of the estate of GEORGE T. WELCH, deceased,

Appellee.

STIPULATION FOR DESIGNATION OF RECORD FOR PRINTING

Comes now the appellants and the appellee, through their respective attorneys, and hereby designate the entire transcript of record, as prepared and certified by the Clerk of the United States District Court for the District of Washington, as necessary for consideration of this appeal and the whole thereof be printed except all of the original exhibits which are transmitted to be available to the Court for inspection, and application is therefore made for such inspection without printing.

J. CHAS. DENNIS,
United States Attorney.
HARRY SAGER,
Assistant United States
Attorney.

THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.
Attorneys for Appellants.

BURNS POE
MARVIN EVANS
Attorneys for Appellee.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, March 27, 1943. Judson W. Shorett, Clerk, by E.R., Deputy.

[Endorsed]: Filed April 26, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS AND FURTHER DESIGNATION OF RECORD TO BE PRINTED

Comes now the appellants, Thor W. Henricksen, formerly Acting Collector of Internal Revenue for the District of Washington, and Clark Squire, Collector of Internal Revenue for the District of Washington, in compliance with Rule 19(6) of the Ninth Circuit Court Rules and state that they intend to rely on the following points:

1. The decision of the Superior Court of the County of Walla Walla, of the State of Washington, in the suit instituted by the executor against

the Inheritance Tax and Escheat Division of the State of Washington, is not binding upon the Federal courts, nor the defendants. Furthermore, such decision is contrary to the law of the State of Washington, as laid down by its highest court.

2. The stipulation entered into between the executor and the widow and filed in the Probate Court that the trustee should take immediately, and that she was entitled to a life estate only, is not binding on the Federal courts nor the defendants.

3. Under the laws of the State of Washington, the will bequeathed to the widow a life estate plus. She had the right to use both the corpus and the income of the estate during her life time.

4. The remainders to charity cannot be valued with any degree of certainty, as the will provides that "no limitation" is placed upon the widow with respect to the estate involved, and the District Court erred in not so holding and determining.

Appellants further designate this statement of points to be printed in the record on appeal.

Dated this 17 day of April, 1943.

J. CHARLES DENNIS,
United States Attorney.
HARRY SAGER,
Assistant United States Attorney.
THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.
Attorneys for Appellants.

United States of America,
Western District of Washington—ss.

Due and legal service of the within Statement of Points and Further Designation of Record to be Printed is hereby admitted and accepted within the State and Western District of Washington, on the 17 day of April, 1943, by receiving a true and correct copy of the original thereof.

BURNS POE
Tacoma
MARVIN EVANS
CAMERON SHERWOOD
Attorneys for Appellee.

[Endorsed]: Filed May 19, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER THAT CERTAIN EXHIBITS NEED NOT BE PRINTED

Good cause therefor appearing, It Is Ordered that the following original exhibits

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10

Defendant Exhibits: G and M

need not be reproduced in the printed transcript of record, but may be referred to by counsel in their briefs and oral argument, and considered by this Court in their original form.

CURTIS D. WILBUR
Senior United States Circuit Judge.

Dated: San Francisco, Calif., May 21, 1943.

[Endorsed]: Filed May 21, 1943, Paul O'Brien, Clerk.

No. 10409

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOR W. HENRICKSEN, formerly Acting Collector of Internal Revenue for the District of Washington, and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellants

v.

BAKER-BOYER NATIONAL BANK, a corporation, Executor of the Estate of George T. Welch, deceased,

Appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF FOR THE APPELLANTS

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
IRVING I. AXELRAD,
Special Assistants to the Attorney General.

J. CHARLES DENNIS,
United States Attorney.
HARRY SAGER,
Assistant United States Attorney.
THOMAS R. WINTER,
Special Assistant to the Chief Counsel.

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TACOMA, WASHINGTON

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No. 10409

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No. 10409

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF FOR THE APPELLANTS

OPINION BELOW

The memorandum opinion (R. 61-78), findings of fact and conclusions of law of the District Court (R. 79-91) are not reported.

JURISDICTION

This appeal (R. 94-95) involves federal estate

taxes. The taxes in dispute were paid as follows: $7,843.29 and interest of $609.17 on November 1, 1939; $13,574.26 and interest of $1,209.56 on January 9, 1940 (R. 84); $998.57 and interest of $166.43 on March 24, 1941 (R. 85). Claim for refund was filed on April 30, 1940 (R. 84), and a supplemental claim for refund was filed on May 9, 1941 (R. 84-85), both pursuant to Section 910 of the Internal Revenue Code. The claim for refund was rejected by notice dated April 17, 1941, and the supplemental claim for refund was rejected on July 7, 1941. (R. 47.)

Within the time provided in Section 3772 of the Internal Revenue Code, and on August 19, 1941, the taxpayer brought an action in the District Court for the Western District of Washington for recovery of taxes paid. (R. 2-8) Jurisdiction was conferred on the District Court by Section 24, Fifth, of the Judicial Code. The judgment allowed the claim in full and was entered on February 15, 1943. (R. 92-93.) Within three months, and on March 16, 1943, a notice of appeal was filed (R. 94-95), pursuant to the provisions of Section 128(a) of the Judicial Code, as amended by the act of February 13, 1935.

QUESTIONS PRESENTED

1. The decedent bequeathed to his widow "for and during her lifetime all the rest, residue and re-

mainder" of his estate "including the rents, issues and profits therefrom * * * with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee" to charities after income from part of the remainder is paid to his son and grandson for their lives. (a) Did the will give the widow the right to invade the corpus? (b) If so, were the bequests to charities sufficiently definite and ascertainable as of the date of testator's death to be deductible in determining the net estate for estate tax purposes under Section 303(a)(3) of the Revenue Act of 1926?

2. The respondent and testator's widow entered into a stipulation to partition the estate approved by the Superior Court of the State of Washington. The respondent also brought suit against the Washington Inheritance and Escheat Division in the Superior Court of the State of Washington for (1) a determination that the residue of the estate for charity was for use in the State of Washington and (2) a construction of the will that the widow had no power to invade the corpus. The State had sought an additional inheritance tax because the residue of the estate to charities was not limited to the State of Washington. The Superior Court determined the

state inheritance tax issue against the State and in addition held that the widow had no power to invade the corpus. Are the decrees entered pursuant to stipulation and in the State tax proceeding that the widow had no power to invade the corpus conclusive for federal estate tax purposes?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Revenue Act of 1932, c. 209, 47 Stat. 169, Section 807, and Revenue Act of 1934, c. 277, 48 Stat. 680, Sections 403(a) and 406:

> SEC. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—
>
> * * *
>
> (3) The amount of all bequests, legacies, devises, or transfers, * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes * * *.
>
> * * *

Treasury Regulations 80 (1937 ed.):

> Art. 47. *Conditional bequests.*—
>
> * * *
>
> If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole

or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

STATEMENT

The relevant facts as found by the District Court are as follows:

George T. Welch, the decedent, died on April 15, 1937, at Walla Walla, Washington, at the age of 95 survived by his widow, Carrie Welch, then aged 87, and by his son, Fred Welch, and a grandson, George Allen. He left an estate of $226,303. This was one-half of the community estate of which the other half under the laws of Washington belonged to the widow. The decedent and his widow had been married and lived together more than 50 years. (R. 62, 82.)

George T. Welch left a will dated in 1930 and a codicil, in 1931, which were admitted to probate by the Superior Court of the State of Washington, Walla Walla County, as his last will and testament. (R. 62, 82.) In the will, as modified by the codicil, he made two cash bequests of $500 each. (R. 62.) The remainder of his estate he left to his wife by the following language of Article V (R. 63-64):

* * * * unto my said wife, Carrie Welch, for

> and during her life time, should she survive me, all the rest, residue and remainder of my estate, both real and personal, including the rents, issues and profits therefrom, and of whatsoever the same may consist and wheresoever situated, with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose or any accounting be made thereof, with the then remainder over upon her death unto my Trustee, hereinafter named, in trust, nevertheless, for the uses and purposes hereinafter mentioned * * * .

"Subject to the life estate hereinbefore given, devised and bequeath [sic] unto my said wife, Carrie Welch, in my estate, should she survive me as aforesaid," he gave his trustee, the respondent herein, $30,000, the income, if any, to be paid to his son, Fred B. Welch. He also gave to his son, subject to the life estate of the widow, his undivided one-half interest in certain realty as his son's absolute estate. (R. 62.)

Similarly, subject to the life estate of the widow, he gave the income from $12,500 in trust to his grandson, George B. Allen. The remainder of the $12,500 was bequeathed also in trust for admitted charitable use by the Board of Conference Claimants, Inc., of the Pacific Northwest Annual Conference of the Methodist Episcopal Church. All the remainder of his estate, subject to his wife's life estate, and the son's right to the income from $30,000, and his absolute estate in certain realty, was devised to respondent in

trust for the concededly charitable purposes of providing support or education for boys and girls, providing support for the poor, aged and infirm, and erecting a home for the aged as a memorial to the testator and his widow. (R. 63.)

At the time the will was executed the wife's half interest in the community estate was approximately one quarter of a million dollars. At that time she was about 80 years of age, an invalid with a brief life expectancy and of fixed habits of simple frugality. (R. 87.)

The widow entered into a stipulation approved by the Superior Court of the State of Washington for Walla Walla County on May 9, 1938, for the partition of the estate (R. 115-164), the effect of which was to permit the widow to receive only the income from her husband's property (R. 88).

The Superior Court of the State of Washington for Walla Walla County entered an order on March 29, 1940, in the matter of the estate of *George T. Welch, deceased, Baker-Boyer National Bank, a corporation, as Executor and Trustee v. State of Washington, Inheritance Tax and Escheat Division,* No. 26994. The order provided in part that the widow had no right to invade the corpus. No appeal was taken from the order of the Superior Court. (R. 70.)

The executor, the respondent herein, filed an estate tax return with the appellant, Henricksen, Acting Collector, of a gross valuation of $226,303.96, and a net valuation of $7,325.42 for estate tax purposes. The estate tax shown on the return and paid by the respondent was $146.50. The executor took as deductions in the return bequests for religious, charitable, scientific and educational purposes, $12,500 to the Board of Conference Claimants, Inc., of the Pacific Northwest Annual Conference of the Methodist Episcopal Church (subject to the life estate of the widow and grandson and $159,035.74 residue, subject to the life estate of the widow and the life estate of the son in $30,000, to the respondent herein as trustee, for the relief of aged, indigent and poor, for the construction and maintenance of a memorial hospital and home and for the support and education of worthy boys and girls. (R. 83.)

The Commissioner raised the gross valuation of the estate to $228,244.50 (not here in question) and increased the net estate to $180,301.68 by the disallowance of the above described charitable bequests, thereby increasing the estate tax $21,417.55, which was paid to the Collector with interest on November 1, 1939, and January 9. 1940. On March 24, 1941, plaintiff paid an additional assessment and interest in the total amount of $1,165. (R. 83-84, 85.)

Timely claims for refund of the amounts so paid were made and rejected by the Commissioner. (R. 84-85.)

On August 19, 1941, the respondent filed an action in the District Court for the Western District of Washington for recovery of the taxes paid, plus interest. (R. 2-49.) The District Court entered a judgment for the total amount claimed plus interest. (R. 92-93.)

STATEMENT OF POINTS TO BE URGED

1. The decision of the Superior Court of Walla Walla County in the suit by the executor against the Inheritance Tax and Escheat Division of the State of Washington is not binding upon the federal courts, nor the appellants. Moreover, the decision is contrary to the law of the State of Washington as determined by its highest court.

2. The stipulation entered into by the executor and the widow and filed in the probate court to the effect that the trustee should take immediately and that the widow was entitled only to the income of the testator's estate is not binding on the federal courts nor on the appellants.

3. Under the law of the State of Washington, the will bequeathed to the widow a life estate, plus.

She had the right to use both the corpus and the income of the estate during her life time.

4. The remainders to charity cannot be valuated with any degree of certainty because the will provides that "no limitation" is placed upon the widow with regard to the estate involved and the District Court erred in not so holding and determining.

SUMMARY OF ARGUMENT

I

A. The decedent's will bequeathed the remainder of his estate to his widow for life—

> including the rents, issues and profits * * * with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death * * * —

in trust to the executor in part to pay the income to his son and grandson for life and the rest to charities. This provision, when considered in the context of the entire will and in light of state decisions, gave the wife the right, without limitation, to the income and corpus of the estate during her life.

B. Since the widow was entitled to spend the principal without limitation, there is obviously no way of ascertaining the amount of the corpus that she would use. In those circumstances the amount of

the charitable remainders was not ascertainable on the date of the decedent's death. They could not, therefore, be deducted from the gross estate under the terms of the statute.

II

The decree of the Superior Court of the State of Washington partitioning the estate, entered pursuant to stipulation of the widow and respondent, was not a decision on the merits of the extent of the widow's estate under the will and is not conclusive here. It was in all respects a consent decree, and the court had no occasion to consider the question on the merits. Since the widow had a right to give up a portion of her estate, the decree may be binding on her, but only the estate she took under the will is relevant.

Similarly, the order of the same court in the action brought against the State Inheritance Tax Division insofar as it dealt with the extent of the widow's estate under the will was not a determination on the merits because the State had no interest in that portion of the decision. Moreover, since neither the widow nor any of the remainder interests was a party to the proceeding, the order did not settle their property rights under the will. Therefore, under well established principles the order is not binding in this proceeding.

ARGUMENT

I

THE WIDOW ACQUIRED A POWER TO INVADE THE CORPUS WITHOUT LIMITATION, RESULTING IN THE UNASCERTAINABILITY AT TESTATOR'S DEATH OF THE AMOUNTS BEQUEATHED TO CHARITY UNDER SECTION 303(a) (3) OF THE REVENUE ACT OF 1926, AS AMENDED

A question precedent to that of whether the amounts of the bequests to charity were ascertainable at the date of testator's death and, accordingly, the amounts deductible from the gross estate for estate tax purposes under Section 303(a) (3) of the Revenue Act of 1926, as amended, *supra*, is the nature of the widow's estate under the will. This, of course, necessitates an interpretation of the will in the light of state law.

A. *The will conferred upon the widow an unlimited power to invade the corpus*

Under the will as modified by a codicil, the testator made two cash bequests of $500 each. In Article V he made a bequest to his widow in the following language (R. 12):

> I do hereby give, devise and bequeath unto my said wife, Carrie Welch, for and during her life time, should she survive me, all the rest, residue and remainder of my estate, both real and personal, including the rents, issues and profits

> therefrom, and of whatsoever the same may consist and wheresoever situated, with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee, hereinafter named, in trust, neverthelss, for the uses and purposes hereinafter mentioned, * * *.

By Article VI (R. 13-15) he gave certain realty to his son "as his absolute estate" but "subject to the life estate hereinbefore given." Article VII (R. 16-18), as amended by a codicil (R. 9-11) subject to the life estate bequeathed to the widow, gave $30,000 to the respondent, in trust, to pay the net income to testator's son for life with the remainder over for the relief and support of the poor and the maintenance of the sick or maimed. Article VIII (R. 19-22), also subject to the widow's life estate, establishes a trust of $12,500, the income of which is to be paid to the testator's grandson for life, with the remainder over, including unused net income, to the Board of Conference Claimants, Inc., of the Pacific Northwest Annual Conference, Methodist Episcopal Church. Article IX (R. 22-27), subject to the other provisions of the will, and specifically the widow's life estate, provides a trust with respondent as trustee for the support or education of worthy boys and girls, the relief of the aged, indigent, sick or

maimed and the erection of a memorial home for the aged.

1. The crux of the controversy is the interpretation of Article V. A careful consideration of the section in light of the entire will, we submit, leaves no reasonable doubt that the testator gave his widow a life estate with power to invade the corpus. The section is, in part, that she is to have all the remainder of his estate for and during her life "*including the rents, issues and profits.*" If, as respondent contends, the widow is limited to the income from the property, it is stated ineptly.[1] The language implies more. If rents, issues and profits are included, something quite apart must have been given, and since rents, issues and profits are obviously synonymous with income it follows that the essence of the bequest, of which rents and profits are included, is the corpus.

The clause "*with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof*" seems to provide,

---

[1]It will be noted generally that the will is meticulously drawn apparently by a careful practitioner. Yet most of the arguments made by respondent and accepted by the trial court negative the otherwise unmistakable implication, that the draftsman knew how properly to create an intended estate.

as authoritatively as is possible in the English language, that the property was hers without limitation, so long as she lived.[2] If only the right to income for life were intended, the wife could still spend the income as she desired and would be without duty to account. Unless the language is meaningless, it must by an expression aiming to safeguard a greater estate. This is further emphasized by the words that "no limitation is placed on my said wife in any expenditures."[3] And as if that were not clear enough, the testator prefaced the provision by the phrase "with the distinct understanding." Nothing in the entire will receives emphasis in anything like such mandatory language. If no limitation is placed on expendi-

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[2]This is emphasized by contrasting other provisions. The remainder to the son and grandson express very clearly the right only to the income of certain property for life. It is difficult to see how an instrument, if it were intended that it give identical estates to the wife as were given to the son and grandson except for the spendthrift provisions to the latter, could so clearly be drawn with respect to the son and grandson with minute description of the exact estate, but where the wife is concerned, language as sweeping as "distinct understanding that no limitation" is used.

[3]The District Court argued that "expenditures" means to pay out. (R. 72-73.) But the term is not used to limit payments to those from income. That the court found it necessary in its construction to supply the words "of the income" (R. 74) to expenditures, suggests that it was rewriting the will.

tures, the only possible conclusion is that the wife was entitled to spend income and corpus.[4]

Article V contains the phrase, the "then remainder over" upon her death, which connotes the possibility of the corpus having undergone a quantitative change during the tenure of her estate. Its strength is the greater in this regard, in view of the cumulative effect of the other clauses of the same sentence just considered. This interpretation is, moreover, supported by the cases, for they are legion, in which it has been held that "then remainder" and synonymous phrases serve to give to the holder of a life estate to right to invade the corpus. The holdings have been accurately summarized as follows (114 A.L.R. 951):

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[4]The District Court's argument that the provisions only were intended to free the widow from fear of making expenditures from income as corroborated by the solicitude shown for her in Article XII (R. 28-29) where respondent is made executor to free the widow from responsibility, is unrealistic. A life tenant has no duty to account for expenditures out of income as a matter of law as observed, *infra*, and placing no limitations on her expenditures simply has no relation to freeing her from obviously onerous duties of executrix. One provision is a grant of a larger estate, the other merely an explanation of why someone else was to be executor. It corroborates the esteem, indicated throughout the will, in which the testator held the widow. If anything, it indicates that he would be very generous toward her.

> The later cases support the rule stated in the earlier annotations to the effect that the life tenant under a will providing for a remainder over of "what remains", "so much as may remain unexpended," or some synonymous term, is entitled to the possession, control, and use of the entire devised property to be disposed of as he sees fit, though he may make no testamentary disposition of the property nor fraudulently dispose of the same for the purpose of defeating the estate in remainder.

See also *Porter v. Wheeler*, 131 Wash. 482, discussed, *infra*. Added to the importance of the phrase because of its ordinary connotation then, is its significance as a term of art with the probability that it was utilized as such by the lawyer who drafted the instrument.

The District Court concluded that the phrase meant, not that the corpus might be diminished, but that unspent income was to be included in the remainder. (R. 71, 75.) This is completely untenable, in view of (1) the familiar law that a life tenant is entitled to all the income outright (see, for example, American Law Institute, Restatement of the Law of Property, §§ 119, 120), and (2) where the testator intended the remainder over to include income, he expressly so stated as in the remainder after the termination of the son's estate (R. 16-17) and that termi-

nating the grandson's (R. 20).[5] In this connection, the use of "then remainder" should also be compared with the language pay over "and deliver the *principal* of said trust fund" (Italics supplied) which describes the remainder after both the son's and grandson's estates. (R. 16, 20.) The conclusion is hardly escapable that avoidance of the use of the term "principal" to describe the content of the remainder after the wife, in view of its consistent use elsewhere in the will, underlines the usual significance to be given "then remainder" and synonymous expressions.

Porter v. Wheeler, 131 Wash. 482, is similar to the instant case on its facts. The testator provided for his wife as follows (p. 484):

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[5]The District Court's query, "How can we say that the testator did not assume that the period when the net incomes might not all be used would be during his wife's life estate?" (R. 75) is answered by the express language of the will. The description of the remainder to include unexpended income, is used only after the termination of the son's and grandson's estate. Moreover, with respect to them, a trust was created with directions to the trustee to pay income "so long as he can personally use and enjoy the same"; (R. 16, 19) not to pay if the amount could be taken by their creditors; and was to be forfeited entirely in case of bankruptcy (R. 18, 21). The wife's interest was, however, clearly not in trust, so that there could be no limitation on payment of income to her—she pays to herself. There could then be no unused income after the wife's estate, which would be segregated from her other property.

> I give, devise and bequeath to my wife Mary Wheeler Porter all the balance of my property, real, personal and mixed of which I may die seized, * * * to be used and enjoyed by her during her lifetime; and at her death, I will that all of said property not used for her support and comfort, go to my said son Alvah Porter.

The case arose when the testator's son sought to have himself decreed the owner of the remainder after the testator's wife's death because her will left the property to others. The court said (pp. 486-487):

> * * * the language of the will does not limit her right to the bare use of the property in the sense of limiting her right to income therefrom with a view of preserving the property during her lifetime), but manifestly gives her the right to support and comfort from the property even though it be consumed in furnishing her support and comfort during her lifetime.

The court concluded that the widow had unlimited use, and power to dispose, of the property during life, but could not dispose of it by will or other method to take effect at death.

If a will providing that property "is to be used and enjoyed during her lifetime" gives, under Washington law, power to invade the corpus, a will providing "for and during her lifetime" property "including the rents, issues and profits therefrom * * * with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may

make for any purpose or any accounting be made thereof," *a fortiori* gives power to invade the corpus; i.e., a life estate plus.

The provision in the *Porter* will, "I will that all of said property not used for her support and comfort" is similar to the "then remainder" provision here and the Washington court attached the significance to it which we urge.

2. Respondent's principal argument below was that other sections of the will are inconsistent with interpreting Article V as giving the widow power to invade the corpus in that her interest in all other places is referred to as a life estate. This argument assumes that life estates and the power to invade are inconsistent provisions. The law in Washington and the weight of authority is, however, directly contrary. *In re Gochnours' Estate*, 192 Wash. 92; *In re Bolstad's Estate*, 200 Wash. 30, 35; *In re Ivy's Estate*, 4 Wash. 2d 1, 5-6; American Law Institute, Restatement of the Law of Property, §111.[6]

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[6]The Restatement states the proposition as follows: "A form of limitation effective to create an estate for life * * * is not prevented from creating an estate for life * * * by the fact that such form of limitation is accompanied by further language effective to create in favor of the conveyee a power, either limited or unlimited, to dispose of the complete property in such land."

The *Gochnour* case, for example, involved the question arising out of a state inheritance tax controversy, whether an estate for life with power to alienate was nevertheless a life estate. The court held that Jacob Gochnour took a life estate notwithstanding his absolute power of disposal during his lifetime.

3. The District Court was impressed with extrinsic evidence of the testator's intention. Thus the court stated (R. 68-69):

> Under the uncontradicted testimony admitted in evidence it appears that at the time the will was executed the wife's half interest in the community estate approached a value of a quarter of a million dollars; that when the will was made she was about eighty years of age, an invalid, with a brief life expectancy, and of fixed habits of simple frugality. Certainly the income from her one-half of the community estate plus the income from the life estate in her husband's property provided by his will made absolutely unnecessary any invasion by her of the corpus of any portion of her husband's estate.

Yet it is settled law in Washington that a will is to be construed, whenever possible, from its language "unaided by extrinsic facts". *In re Phillips' Estate*, 193, Wash. 194, 197; *Shufeldt v. Shufeldt*, 130 Wash. 253, 258. And were it proper to resort to this evidence, it does not support the court's position; moreover, the court's conclusion is plainly irrelevant, for whether it is necessary to invade the corpus is of no

significance if the husband in fact gave her the power. The court apparently confused the problem of interpretation of the will with such cases as *Ithaca Trust Co. v. United States*, 279 U. S. 151, where the will provided for use of the corpus if necessary for support and the controversy was not what the will provided but whether a Section 303(a)(3) deduction was permissible on a given interpretation. These cases are referred to in Point 1 B, *infra*. Nor is the evidence of her frugality, advanced age, ill health and independent wealth material on the issue of testator's intention to give her only the right to income. It would seem rather that respondent has proved too much, since it is beyond question that her own estate was many times over adequate to support her during her brief life expectancy. If the testator were only interested in her support, he need have left her nothing. It is more probable to assume that his esteem for his wife after more than fifty years of married life was such that he wanted to give her the same dominion over his property as he himself had had, reserving only the right to name the recipients of what was left after her death.[7] Certainly a consideration of the entire will does not show that the

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[7]The support which the trial court found in the fact that if the widow has a right to invade the corpus, the son and grandson might take nothing

charities were his chief concern. Apart from the two specific bequests of but $500 each, his first concern was for his wife in language without limitation except for the power to dispose at her death. Nor is this a case in which evidence shows that the testator had a strong attachment for a particular charity since, apart from the relatively modest bequest to the Board of Conference Claimants of the Methodist Episcopal Church, the remainder to charity runs the gauntlet of charitable generalities, covering almost every possible charitable purpose from education and support of children through "maintenance of the sick or maimed" to "relief and support of the aged, indigent and poor." (R. 28.)

4. The District Court attached great signifi-

(R. 75-76), is illusory. In view of the limited remainder he left to the son and grandson and the spendthrift provisions (R. 17-18, 20-22), and those cutting off the son and grandson, if they should contest, or aid in contesting the will (R. 27-28), plus the fact that they were to take nothing until the termination of the wife's estate, is indicative that the testator was not solicitous of their interests. The extreme deference the will expresses for the widow as opposed to the next remaindermen leaves little doubt that it was intended that the widow might so utilize her estate as to destroy the next remainders. The District Court's conclusion that the widow received no right to the corpus because then she could destroy the son's remainder, is without support, moreover, elsewhere in the will.

cance to the fact that the will gave the trustee power to sell and use the principal of the income while not doing so with respect to the widow's estate. (R. 65.) This is clearly misplaced emphasis in view of the fact that it is customary and highly desirable from the fiduciary's point of view to have spelled out in detail his power with respect to the corpus. And since the will was drafted only after conferences with the prospective trustee, (R. 179-181) presence of these powers as a protection to the trustee is not surprising. It was obviously unnecessary to enumerate such powers as selling, investing and reinvesting in light of the more inclusive language used with respect to the widow's estate and to have done so might have had the effect of limiting the estate. Cf. *Mead v. Welch*, 95 F. (2d) 617 (C.C.A. 9th), and see footnote [8], *infra*.

5. The District Court relied on the *Mead* case as supporting its interpretation of the will. Although this Court there concluded that the widow took only a life estate, the differences in the language of the will and California law with relation to which the will was properly construed makes the case quite different. The case, on the contrary, tends to support our position. The pertinent part of the will there involved provided (p. 618):

> * * * will and direct that there be paid and distributed to her [his wife] all my property, real,

> personal, and mixed, for and during her natural life, and for her own use, with power to sell, convey, assign, transfer, collect, invest, and reinvest the same, or any part thereof, or the proceeds thereof, or any part thereof. 2nd. Of the property constituting my estate at her death, I will and direct that the sum of Two hundred thousand ($200,000.00) dollars in money or property be transferred to the trust executed by myself and wife * * *.

The Court stated the Government conceded that the language gave only a life estate (p. 618) were it not for the language "of the property constituting my estate at her death." But in view of the power of the wife to "sell, convey, assign, transfer, collect, invest, and reinvest", it is clear that if that language gave only a life estate, the "of the property constituting my estate at her death" clause is consistent with the interpretation that it described the changed composition of the corpus rather than its diminution,[8] unlike the more inclusive granting clause to the widow here and the "then remainder" clause with its quantitative

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[8]Thus in the *Mead* case an estate for life with power to sell, invest, reinvest, etc., was interpreted as giving no right to invade the corpus. The language indicates a fiduciary interest such as is a trustee, or a life tenant with respect to the remaindermen. The trial court's reliance then on the lack of enumeration of these powers in designating the widow's estate in the instant case, although given to the trustee, is (1) inconsistent with the *Mead* decision and (2) unsound in principle as argued, *supra.*

rather than qualitative connotation in the context of the entire will.

Furthermore, as the Court pointed out, the granting clause limited the property "for her own use" which, under California law, conveyes only a life estate.

6. The trial court found merit in the contention that a decree of distribution entered by the Superior Court (R. 138-164), pursuant to stipulation (R. 115-137), and a later determination by the same court arising out of a state inheritance tax controversy (R. 102 - 104) is conclusive on the Commissioner (R. 71). The question whether they are conclusive is discussed in Point II, *infra*. The Court said that in any event the decrees are persuasive of the proper interpretation of the will. (R. 71.) We think that conclusion erroneous. The decree of distribution divided the properties so that the respondent, as trustee, took the testator's half of the community property immediately. In other words, the widow was willing to have the property constitute a trust fund with income to her for life. In view of the complete absence of any words of trust in connection with the widow's estate, the many phrases indicating more than a trust beneficiary interest and the precise words of trust used elsewhere in the will when

a trust was intended, the agreement to partition is clearly a distortion of the will. By this, of course, we impute no unworthy motive to the parties. The widow was at liberty to have the property so treated. But we are only concerned with the interests transferred at testator's death and not those resulting from the widow's voluntary contraction of her interest. See *Taft v. Commissioner*, 304 U. S. 351, 357-358; *Davison v. Commissioner*, 81 F. (2d) 16, 17 (C.C.A. 2d); *Robbins v. Commissioner*, 111 F. (2d) 828 (C.C.A. 1st). Thus where, as in the *Taft* case the executor made a payment pursuant to the promise of the testatrix, and in the *Davison* case the legatee voluntarily relinquished a power of appointment, and in the *Robbins* case a compromise agrement was made specifying amounts to charity, it was held that although the charities in fact received gifts as a result of the promise, relinquishment, and compromise, respectively, they were not transfers or bequests within the meaning of Section 303(a)(3) and hence the amounts were not deductible. In view of this settled rule of law, the consent decree of the Superior Court is not persuasive since the interpretation of the will, if that it be, embodied in the decree, puts a much greater strain on the language of the will than even the respondent's position here, occasioned, no doubt, by the fact that the widow permitted the property to go to

the remainder interests named by the testator not because the will required it but because she so desired. Since it is a charitable deduction for a gift by the decedent, which is here involved, the widow's waiver of her rights is ineffective. *Watkins, et al., Exrs. v. Fly* (C.C.A. 5th), decided June 4, 1943 (1943 Prentice-Hall, par. 62, 677), and opinion on July 7, 1943, denying taxpayer's petition for rehearing (1943 Prentice-Hall, par. 62,738).

Nor is the decision of the Superior Court in the action brought by the respondent against the State Inheritance Tax and Escheat Division in the least persuasive. The controversy with the State was limited to whether the charitable bequests were for use within the state (R. 164-166), and so appears on the face of the Court's order (R. 102-104). Nevertheless, the respondent, after assessment of the deficiencies here in question, asked the Superior Court to determine also that the widow had no right to invade the corpus of the estate she took. Since the widow had already stipulated that her interest was so limited and, so far as appears, no one contested it except the Commissioner of Internal Revenue, the action must be viewed as a consent decree obtained without the real party in interest, the Commissioner. Rather than being persuasive of the proper interpretation of the will, the action so instigated by respondent is indicative

that it was so doubtful of its position that, for whatever use could be made of it, a determination by a court which had only one side presented to it was sought and obtained. It is patent that the fact that the State of Washington which had a claim for more than $30,000 in taxes did not appeal, is irrelevant to the soundness of that part of the decision in question, since the State had no interest in the wife's power to invade. That the court below found support for its interpretation of the will in this fact (R. 70) is, we respectfully submit, indicative of the unsoundness of the result reached.

B. *Since the amounts of the bequests to charity were not ascertainable, they may not be deducted in computing the net estate under Section 303 (a) (3)*

If the Court accepts the position that the widow acquired the right, without limitation, to invade the corpus ,the amounts charity will receive, if any, are unascertainable. We need not labor the point that if the widow had discretion to do anything she desired with the money, except dispose of it at her death, we are without a semblance of a standard, at testator's death, by which to measure what the charities will receive. The deduction must therefore be denied. *Ithaca Trust Co. v. United States*, 279 U. S. 151; *Humes v. United States*, 276 U. S. 487; *Gammons v. Hassett*, 121 F. (2d) 229 (C.C.A. 1st), certiorari denied, 314

U. S. 673; *Commissioner v. Merchants Nat. Bank of Boston*, 132 F. (2d) 483 (C.C.A. 1st), certiorari granted May 3, 1943.

The trial court relied on the *Ithaca* case for the conclusion that the deduction must be permitted even if it be assumed that the widow has the right to invade the corpus of the estate. (R. 71.) But in the *Ithaca* case the life beneficiary was given the right to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." (P. 154.) The Supreme Court held (p. 154) that under the terms of the will, "The standard was fixed in fact and capable of being stated in definite terms of money. *It was not left to the widow's discretion.*" (Italics supplied.) Here, on the contrary, there is no standard; all is left to the widow's discretion.

The facts found by the trial court, such as that the widow was over eighty years of age, an invalid, independently wealthy and of fixed habits of simple frugality, indicate only that she need not invade the corpus to maintain her standard of living and are irrelevant because she was not limited in her use of the corpus to that purpose. Such facts do not aid in establishing whether she would make gifts of portions or all of the estate.

Similarly, the District Court's findings that the widow had never expressed any wish to invade any of the corpus of her husband's estate, is not relevant because the determination of the value of the remainder must be in light of facts known at testator's death.[9] See *Ithaca Trust Co. v. United States*, *supra*. In the *Ithaca* case the Court, upon permitting a deduction, was required to decide the method of valuing the life interest. The Court held that although the life beneficiary died within six months of the testator, her interest must be valued, not in terms of what actually happened, but rather the probabilities (as could be estimated by mortality tables) at the date of testator's death.

The recent decision of this Court in *Commissioner v. Bank of America, Etc.*, 133 F. (2d) 753, is not inconsistent with our position. There the testator bequeathed the remainder of his property in trust to

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[9]Nor, of course, is the fact relevant that the widow by stipulation, relinquished all rights to the corpus (R. 115-164), because, as explained in Point 1 A, *supra*, the amounts ultimately going to charities pass pursuant to the widow's agreement notwithstanding the stipulation purporting to interpret the will and not as "bequests, legacies, devises or transfers" within the meaning of Section 303(a)(3) of the Revenue Act of 1926, as amended. *Taft v. Commissioner*, *supra; Davison v. Commissioner*, *supra; Robbins v. Commissioner*, *supra*.

pay his sister $3,000 a year for the rest of her life (p. 753)—

> and in case she should, by reason of accident, illness, or other unusual circumstances so require, such additional sum or sums as in the judgment of said trustee may be necessary and reasonable under existing conditions.

with remainder to certain charities. The Court held that the standard as fixed exhibited no greater uncertainty than that in the *Ithaca* case. In the *Bank of America* case, the trustee had a semblance of a standard; here the widow may do whatever she desires—a circumstance which as noted, *supra*, the Court in the *Ithaca* case expressly pointed out was not there present. (p. 154.) The case is therefore distinguishable.

But if this Court should conclude that the *Bank of America* case is not distinguishable from the instant one, we respectfully urge this Court's reconsideration of its position there. We urge the position approved by Judge Haney, in his dissenting opinion (p. 755) that the proposition long since adopted in the Treasury Regulations should be upheld, if for no other reason because of the long-continued consistent interpretation of the statute by the regulations during which there have been Congressional re-enactments of the statute. *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 99. Article 47 of Treasury Regulation 80, *supra*,

provides in part that in the case of the existence of the power to invade the corpus by the legatee, to a use or purpose which would have rendered it, to the extent that it is subject to such powers, not deductible had it been directly so bequeathed, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

The test is, thus, that no deduction is allowable where the life tenant is given the power to invade the corpus unless the power of invasion is restricted by standards measurable in terms of money. While it may be said that a good guess could be made of the requirements of the life beneficiary in *Bank of America*, the quality of the standard was different from that in *Ithaca Trust Co.*, and it would seem substantially less capable of prognostication. The apparent overwhelming weight of authority consistent with the Regulations is that the extent of the power of invasion must be definitely ascertainable in terms of money. The ascertainability of the probable course of events will not suffice—they must be certain. See, in addition to the *Ithaca Trust Co.*, *Humes*, *Gammons* and *Merchants Nat. Bank of Boston* cases cited, *supra*, *Burdick v. Commissioner*, 117 F. (2d) 972, 974, certiorari denied, 314 U. S. 631; *Knoernschild v. Commissioner*, 97 F. (2d) 213 (C.C.A. 7th); *Pennsylvania Co. for Insurances, Etc. v. Brown*, 6 F. Supp. 583

(ED. Pa.) affirmed *per curiam*, 70 F. (2d) 269 (C.C.A. 3d).

It is to be noted that the Supreme Court, on May 3, 1943, granted certiorari to the First Circuit in *Commissioner v. Merchants Nat. Bank of Boston, supra*, presumably because of the conflict in principle with this Court's decision in *Bank of America*. If the Supreme Court should reverse the decision in the *Merchants Nat. Bank* case, this Court should, nevertheless, deny the deduction here because unlike that case, it is not possible to say as of the testator's death as the First Circuit conceded could be done in the *Merchants Nat. Bank* case that it is improbable that the life beneficiary would invade the corpus.

II

NEITHER THE STIPULATION FOR PARTITION OF THE ESTATE APPROVED BY THE STATE COURT NOR ITS ORDER IN THE ACTION BROUGHT BY THE RESPONDENT AGAINST THE STATE INHERITANCE DIVISION IS CONCLUSIVE HERE

The facts concerning the decree of distribution entered by the State Superior Court (R. 38-164), pursuant to stipulation (R. 115-137) and the later determination by that court resulting from the action brought by the respondent ostensibly against the State Inheritance Tax Division are discussed, *supra*, in Point I A on the issue whether the decrees were

persuasive of respondent's interpretation of the will. We are here concerned only with whether as a matter of law they are conclusive in this proceeding.

We conceded at the outset that the extent of the widow's estate is a matter of state law. It does not follow, however, on the authority of *Freuler v. Helvering*, 291 U.S. 35, and the similar cases relied on by the trial court (R. 71), that the Superior Court's decrees are conclusive here. On the contrary, the Court in the *Freuler* case was careful to point out that the state proceeding was not collusive in the sense that the parties had joined in submitting an issue on which they were in agreement. It stated that (p. 45) "The decree purports to decide issues regularly submitted *and not to be in any sense a consent decree.*" (Italics supplied.) Here it is beyond question that the decree of partition was entered on stipulation.[10] (R. 138-

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[10]The petition to the Court (R. 115-138) entitled "Stipulation" stated (R. 116):

> Whereas, said Baker-Boyer National Bank of Walla Walla, Washington, in its capacity as such Executor and Trustee, and the said Carrie Welch as such surviving spouse of decedent, have mutually agreed upon a mutual and equal distribution of the residue of said community estate, and after being fully advised of all their legal rights in respect thereto do hereby Stipulate and Agree upon a partition and division of said community estate between the respective parties hereto in manner following:

164.) The implication of the *Freuler* decision is that a consent decree such as this, is not conclusive on the Commissioner. Any other result would leave the door open for the parties to rewrite their interests at the expense of the federal revenue. And the issue has already been so resolved. *First-Mechanics Nat. Bank v. Commissioner*, 117 F. (2d) 127, 130 (C.C.A. 3d); *United States v. Mitchell*, 74 F. (2d) 571, 573 (C. C. A. 7th); *Journal Co. v. Commissioner*, 44 B.T.A. 460, 468 In the *First-Mechanics Nat. Bank* case, the decedent's son had a claim against the estate paid by the executor with the approval of the beneficiaries for which the executor took credit in a final account approved by the state probate court. The Third Circuit held that although such a claim, even though not legally enforceable, might be allowed, it "cannot affect the tax liability of the estate."[11]

Similarly, the order of the Superior Court in *George T. Welch, Deceased, Baker-Boyer National Bank, a corporation, as Executor and Trustee v. State*

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[11] As the Seventh Circuit succinctly pointed out in the *Mitchell* case, *supra*, the fact that the probate court allows a claim has no bearing on its deductibility under Section 303 (a) (1) because—

> One may pay a claim which he is under no legal obligation to satisfy. He may make gifts. He may waive legal defenses and, prompted by most commendable motives, assume and pay obligations that have no legal basis for support.

of Washington, Inheritance Tax and Escheat Division (R. 102-104), insofar as it is relevant here, was a non-adversary proceeding. The only controversy with the State of Washington was whether the charitable trusts were limited to the State of Washington (R. 164-166) and this appears on the face of the order (R. 102-103). After deciding the state tax question, the court stated (R. 103)—

> * * * and the executor and trustee herein having raised the question that he is entitled to instructions from the court directing as to * * * the terms of said will * * * —

the order then providing that the widow was entitled only to the income for life. (R. 103-104.) Since neither the State nor anyone else[12] has any interest in the court's determination whether the widow could invade the corpus, the issue cannot be said to have been decided on its merits in an adversary proceeding.

Moreover, the decision did not determine property rights within the meaning of *Freuler v. Helvering, supra*, and *Blair v. Commissioner*, 300 U. S. 5, 10. Neither the widow nor the remainder interests was a party to the proceeding. The proceeding therefore could not determine their rights under the

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[12]The widow had previously stipulated a relinquishment of any right to the corpus of the estate.

will. See *Security First Nat. Bank of Los Angeles, Executor v. Commissioner*, 38 B.T.A. 425.

CONCLUSION

The judgment of the Court below is erroneous and should be reversed.

Respectfully submitted,

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No. 10409

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOR W. HENRICKSEN, Formerly Acting Collector of Internal Revenue for the District of Washington, and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellants,

v.

BAKER-BOYER NATIONAL BANK, a Corporation, Executor of the Estate of George T. Welch, Deceased,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge.*

BRIEF FOR THE APPELLEE

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No. 10409

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOR W. HENRICKSEN, Formerly Acting Collector of Internal Revenue for the District of Washington, and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellants,

v.

BAKER-BOYER NATIONAL BANK, a Corporation, Executor of the Estate of George T. Welch, Deceased,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge.*

BRIEF FOR THE APPELLEE

OPINION BELOW

Contrary to appellants' statement, the decision below is reported as Baker-Boyer Nat. Bank v. Henricksen, et al., 46 F. Supp. 831.

The memorandum decision likewise appears in the record. (R. 61-78.)

The findings and conclusions of law also may be found in the transcript. (R. 79-91.)

JURISDICTION

The jurisdiction of the District Court was invoked under Section 24 (5th and 20th subdivisions) of the Judicial Code. (Title U. S. Code 41 subd. 5th and 20th). This is a suit to recover estate tax and interest alleged to have been erroneously assessed and collected. All of the tax and interest involved, except $1165.00, were paid to an Acting Collector of Internal Revenue, who was not in office at the commencement of the action, (R. 53).

Judgment was entered below on February 15, 1943, below allowed in favor of the appellee, on the appellee's claim for the refund of the estate tax and interest, the judgment being for $24,356.74, together with interests and costs (R. 92-93).

QUESTIONS PRESENTED

1. The fundamental question in this case is: Were the bequests to charities sufficiently definite in amount as of the date of the testator's death to be deductible in determining the net estate for estate tax purposes?

(a) The testator left the widow with approximately $225,000.00 in her own right and left her a life estate in an equal amount. The question is:

Reading the will "from the four corners" and in the light of the circumstances surrounding the testator, did the life tenant, under the provisions of the will, have power to defeat the charitable remainder by invading the corpus of the estate?

(b) Are the two identical constructions of the will made by the Probate Court, that is, the Decree of Distribution and the Order of March 29, 1940, construing the will decisions which this court should follow?

(c) Was it highly improbable at the date of the testator's death that the transfers to charity would be defeated by the life tenant?

STATUTES AND REGULATIONS INVOLVED

Sec. 303 (3) (a), Revenue Act of 1926 as amended, as set out in appellant's brief.

Treasury Regulations 80 (1937 ed.)

Art. 44. *Transfers to public, charitable, religious, etc. uses.*

> "Deductions may be taken of the value of all property transferred by Will . . . (3) to a trustee or trustees . . . if such transfers, legacies, bequests or devises are to be used by such trustee . . . exclusively for religious, charitable, . . . or educational purposes . . .
>
> "If a trust is created for both a charitable and a private purpose deduction may be taken of the value of the beneficial interest in favor of the

former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use."

Treasury Regulations 80

Art. 47. *Conditional bequests.* "If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

FOOT NOTE. *Present Regulation on Conditional Bequests is*—Regulation 105, Sec. 81.46; Reading as follows:

If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take it so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

Section 1533, Remington's Revised Statutes of Washington.

Hearing on final report—Decree of distribution. Upon the date fixed for the hearing of such final report and petition for distribution, or either thereof, or any day to which said hearing may have been adjourned by the court, if the court be satisfied that the notice of the time and place of hearing has been given as provided herein, it may proceed to the hearing aforesaid. Any person interested may file objections to the said report and petition for distribution, or may appear at the time and place fixed for the hearing thereof and present his objections thereto. The court may take such testimony as to it appears proper or necessary to determine whether the estate is ready to be settled, and whether the transactions of the executor or administrator should be approved, and to determine who are the legatees or heirs, or persons entitled to have the property distributed to them, and the court shall, if it approves such report, and finds the estate ready to be closed, cause to be entered a decree approving such report, find and adjudge the persons entitled to the remainder of the estate, and that all debts have been paid, and by such decree shall distribute the real and personal property to those entitled to the same. The court may, upon such final hearing, partition among the persons en-

titled thereto, the estate held in common and undivided, and designate and distribute their respective shares; or assign the whole or any part of said estate to one or more of the persons entitled to share therein. That the person or persons to whom said estate is assigned shall pay or secure to the other parties interested in said estate their just proportion of the value thereof as determined by the court from the appraisement, or from any other evidence which the court may require.

If it shall appear to the court at or prior to any final hearing that the estate cannot be fairly divided, then the whole or any part of said estate may be sold or mortgaged in the manner provided by law for the sale or mortgaging of property by executors or administrators and the proceeds thereof distributed to the persons entitled thereto as provided in the final decree. Upon the production of receipts from the beneficiaries or distributees for their portions of the estate, the court shall, if satisfied with the correctness thereof, adjudge the estate closed and discharge the executor or administrator.

The court shall have authority to make partition, distribution and settlement of all estates in any manner which to the court seems right and proper, to the end that such estates may be administered and distributed to the persons entitled thereto. No estate shall be partitioned, nor sale thereof made where partition is impracticable, except upon a hearing before the court and *upon the testimony of at least three disinterested witnesses* previously appointed by the court for the purpose of viewing such property to be partitioned or sold. The court shall fix the values of the several pieces or parcels to be partitioned at the time of making such order of partition or sale; and may order the property sold and the pro-

ceeds distributed, or may order partition and distribute the several pieces or parcels, subject to such charges or burdens as shall be proper and equitable. (Italics supplied.)

Sec. 11202-I 1. Remington's Revised Statutes of Washington. *Increase in Tax Valuation to Conform to Subsequent Federal Estate Tax Valuation.*

"If after the values have been determined under the state statute for inheritance tax purposes, the same estate is valued under the federal estate tax statute and the value of the property, or any portion thereof, fixed under the federal law, is increased above the value fixed under the state statute as provided in section 5, chapter 134, Laws of 1931 (section 11202-B, Rem. Rev. Stat.) and this valuation under the federal estate tax, is accepted by the estate either by agreement or through final determination in the federal court, then in that event, the value as fixed under the state statute upon such property or portion thereof shall be increased to this amount for state inheritance tax purposes.

Applicability to pending cases, see P. 11211 e—I therein.

Sec. 1415 Remington's Revised Statutes of Washington.

INTENT OF TESTATOR CONTROLLING

"All Courts and others concerned in the execution of Last Wills shall have due regard to the direction of the Will, and the true intent and meaning of the testator, in all matters brought before them."

STATEMENT

The trial judge, in his carefully prepared decision (R. 61, et. seq.) sets forth the facts in correct detail. See also the reported opinion, Baker-Boyer Nat. Bank v. Henricksen, 46 F. Supp. 831.

The case is one involving the proper construction of the will and codicil of the late George T. Welch, a retired farmer, who died April 15, 1937, at the age of 95 years. At the time will was made his wife, Carrie Welch, was 80 years of age and in delicate health (R. 183, 212 and 218); his son, Fred Welch was 50 years of age (R. 54); and his grandson, George B. Allen was 21 years of age (R. 54).

The will and codicil (R. 9-30) were admitted to probate in the Superior Court of the State of Washington for Walla Walla County (R. 54.)

Mr. Welch's will and codicil in brief provided:

1. He gave two specific bequests of $500.00 each to old friends (R. 12).

2. He gave to his wife, Carrie Welch, in paragraph V, (R. 12) (Note 1), "for and during her life time" "all of the rest, residue and remainder" with the income therefrom without limiting her right to make

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1. Paragraph V in full reads:

"I do hereby give, devise and bequeath unto my said wife, Carrie Welch, for and during her life time, should she survive me, all the rest, residue and re-

expenditures; with the "then remainder" over, save and except his community undivided one-half interest in a small tract of farm land upon her death to the Baker-Boyer National Bank as Trustee upon trusts hereinafter particularly described, ultimately for charitable purposes. If she died first the "then remainder" was all to go to charity, subject to the life estates of the son and grandson, except the above mentioned land, the charities to be set up by the trustee from the

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mainder of my estate, both real and personal, including the rents, issues and profits therefrom, (10) and of whatsoever the same may consist and wheresoever situated, with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee, hereinafter named, in trust, nevertheless, for the uses and purposes hereinafter mentioned, and more particularly set forth, save and except by community undivided one-half interest in certain lands hereinafter described, which I hereinafter give and devise unto my son, Fred B. Welch, freed from any trust provision of my will; but should I survive my said wife, Carrie Welch, then upon my death I do hereby give, devise and bequeath all the then rest, residue and remainder of my estate, both real and personal, including the rents, issues and profits therefrom and of whatsoever the same may consist and wheresoever situated, unto my said Trustee hereinafter named, in trust nevertheless, for the uses and purposes hereinafter set forth, save and except my community undivided one-half interest in certain lands and premises which I hereinafter give and devise unto my said son, Fred B. Welch, freed from any trust provision of my will as aforesaid."

"then remainder" are further discussed in Paragraphs 5, 6 and 7.

3. "Subject to the life estate hereinbefore given . . . unto Carrie Welch" he gave to his son, Fred B. Welch, free from any trust, his community undivided interest in the above mentioned farm (R. 13, 14, 15), the testator's interest being appraised at $2500.00 (Plaintiff's original exhibit M.) If the son died before the father the farm, upon the termination of his mother's life estate, went to charity (R. 22).

4. "Subject to the life estate" of Carrie Welch, he gave to the Baker-Boyer National Bank as Trustee "the sum of Thirty Thousand ($30,000.00) Dollars in cash or the equivalent in value in securities found in my estate" as a spend-thrift trust (Note 2) for the benefit of his son, Fred B. Welch, and upon the son's death to be "used and expended for the relief and support of the poor people, maintenance of the sick or maimed . . . with special reference to such of them as may be living in . . . Washington and Oregon, and particularly in the County of Walla Walla or territory

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2. Paragraph VII (R. 17) of the will provides:

. . . "The provision hereinbefore made for my said son, Fred B. Welch, so long as he may live, should he survive me, is upon the express condition, however, that he be and he is hereby restrained from and is and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his beneficial and legal right, title, interest, claim and estate in and to the income of this trust during his life time . . ." (Italics supplied).

contributory thereto." If neither the wife nor son survived him, this sum was to go direct to charity (R. 10-17). The *son* was *not to have* the *ordinary powers of a life tenant.* The testator imposed limitations on these powers.

5. "Subject to the life estate" of Carrie Welch he gave to the Baker-Boyer National Bank as Trustee "the sum of Twelve Thousand Five Hundred ($12,-500.00) Dollars in cash or the equivalent in value thereof in securities found in my estate" as a spendthrift trust for his grandson, George B. Allen, and upon his death to be given to the Board of Conference Claimants, Inc., of the Methodist Church. (R. 20.)

6. Out of the residue of the estate the Trustee was directed:—

(a) To create a "Revolving Fund" out of principal or net income for the support or education of worthy boys and girls irrespective of nationality, of religious beliefs or creeds. (R. 22-23).

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3. Paragraph VIII. (R. 20) of the will provides:—
". . . The provision hereinbefore made for my said grandson, George B. Allen, so long as he may live, should he survive me, is upon the express condition, however, that he be and he is hereby restrained from and is and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his beneficial and legal right, title, interest, claim and estate in and to the income of this trust during his lifetime. . . . "

(b) To "Expend . . . net income" for the relief and support of indigent and aged people, irrespective of nationality or religious beliefs or creeds, with special reference to such of them as may be living in Washington and Oregon, particularly in Walla Walla County and tributary territory where his estate had been created. (R. 23-24).

(c) To "expend out of principal and/or net income" "amounts sufficient to erect or assist in the erection of a home for the aged as memorial to Carrie Welch and the testator" (R. 24-25) (Italics supplied).

(d) To use any remaining unused income for charity.

7. The directions given to the Trustee with reference to the residuary trusts include the following:

(a) The Trustee was "to hold, maintain and indefinitely retain so long as it believes it is advisable so to do . . . *the identical securities, properties or investments received by it from my estate, whether it be at my death or the death of my said wife,* Carrie Welch, should she survive me" (R. 25-26) (Italics supplied). The trustee's powers include authority "to grant, bargain, sell, exchange, convert and lease . . . pledge, assign, partition, subdivide and distribute . . . the income and principal . . . and to execute any and all instruments . . . requisite and necessary therefor . . ." (R. 26).

8. The Baker-Boyer National Bank was appointed executor "in order that . . . Carrie Welch, may be relieved of the responsibility" (R. 28) and the executor was requested to keep the wife advised of the condition of the estate.

The will is a non-intervention will with authority to the executor to lease or sell all or any part of the estate. (R. 29).

After the time for filing claims against the estate had expired (R. 106), a Final Account and Report and Petition for Distribution was filed, wherein the executor recommended to the Court, that, notwithstanding the widow and the executor had entered into a Stipulation for the partitioning of the property of the estate, Section 1533 of Remington's Revised Statutes be followed and complied with by the appointment of three disinterested persons to view the properties and give their testimony so that the Court might determine whether the proposed division was fair, just and equitable (R. 112). The Court, in the final decree, states:—

> (1) "That Martin Stearns, Bert Witt and Fred Lasater, appointed by order of this court to view the property to be partitioned and distributed herein, have viewed the same, and now testifying in open court recommend that there be partitioned and distributed to the said Baker-Boyer National Bank of Walla Walla, Washington, in its capacity as trustee herein, the real estate and personal property . . . and that there be partitioned and distributed to the said Carrie Welch the real estate and personal property de-

> scribed and referred to in said stipulation . . . her just, fair and equitable division thereof, and that the terms and provisions of said stipulation are just and equitable." (R. 142).

Carrie Welch, the widow, was represented in the distribution proceedings by other attorneys (R. 190, 224, 226) than the attorneys for the executors. They were the attorneys of another Bank (190). When the Court entered the decree of distribution (R. 160) partitioning the estate and distributing it, he did not discharge the executor or close the estate. The estate was held open for final determination and payment of the Federal Estate and the State Inheritance taxes. (164).

The federal and state government were pressing at the same time their claims for additional death taxes. There were numerous conferences in the fall of 1939 between the Technical Staff, Pacific Division, Bureau of Internal Revenue, for the purpose of reaching a settlement of the estate tax case (R. 233). The state was asking for additional inheritance tax in the sum of $34,854.11 resulting from rejection of the exemption for charitable bequests, with 8 percent interest from the date of Mr. Welch's death, and intimated there might be a further increase (R. 173) upon receipt of "the federal audit of the estate tax return."

The gross valuation of the estate was changed in the federal audit to $228,244.50 (R. 56) from $226,303.96 (R. 55). The estate tax was paid on the increased amount and also on the disallowance of the deduction for charity, with the understanding that

the payment thereof would not prejudice the right of the appellee to file a claim for refund of payments of estate tax with interest resulting from the disallowance of items of charity in computing the estate tax. Timely claims for refund were filed and rejected (R. 84, 85). Suit then was instituted, resulting in the judgment which is the basis of this appeal. (R. 2-49, 92, 93).

On March 22, 1940, the appellee, this time both as executor and as trustee, filed in the Superior Court of Walla Walla County, a petition In The Matter of the Estate of George T. Welch, deceased; its petition praying the Court to cite into court the Supervisor of the State Inheritance Tax Division and praying the Court to determine the amount of Inheritance Tax and the executor and trustee also raised the question as to the nature of the estate of the decedent's widow and as to the scope of her power to expend the corpus, reciting among other things that "until the will has been construed . . . should it pay the additional tax now demanded . . . (it) . . . would have no assurance that further tax might not thereafter be demanded" (Word in parenthesis supplied) (R. 171).

On the 29th day of March, 1940, the said Superior Court entered an Order "In The Matter of the Estate of George T. Welch, deceased," No. 26,994 of said court, the same cause in which the Decree of Distribution in the estate was entered (R. 102).

In the Order, the Court, after determining the amount of the inheritance tax, recites "and the ex-

ecutor and trustee herein having raised the question that he is entitled to instructions from the Court directing as to the fund or interest chargeable under the laws of the State of Washington and the terms of said will of the decedent and the Decree of Distribution hereto entered herein, the Court hereby orders, adjudges and decrees and construes the said will and Decree of Distribution . . .

> (2) "That under the words, terms and provisions of said will the said widow, Carrie Welch, has no power to invade the corpus of said estate . . ."

At the trial in the District Court, oral testimony was admitted for the limited purpose of showing the court the true circumstances and conditions surrounding the testator when he made his will and codicil (R. 179).

The oral testimony showed among other things that George T. Welch and his wife had accumulated a community fortune of approximately $450,000.00 in the vicinity of Walla Walla County, adjoining Oregon on the North (R. 54, 55). He had had in mind for some time setting up three or four charitable trusts and about a month before the will involved herein was drawn, had called at the Bank and made inquiry stating that he wanted to make some trusts for charitable purposes (R. 179). After the will was drafted, the managing trust officer of the bank and Mr. Welch's lawyer gathered in the Welch home to discuss with Mr. and Mrs. Welch the provisions of its different parts and their meaning. They went to the home because

Mrs. Welch was then an invalid and tied to her chair. (R. 181).

The testimony also shows that the trustee has paid over to Mrs. Welch from May 9, 1938 to December 31st, 1941, income in the amount of $28,105.00 (R. 204) and that no part of the corpus has ever been paid over to her (R. 189) and she has never asked for any part of the corpus; and that her allowance during the pendency of the probate proceedings was $300.00 a month and that she never asked for any more (R. 190).

STATEMENT OF POINTS TO BE URGED

1. Construing the instrument as a whole, the will bequeathed to the widow a life estate without power to diminish the corpus.

2. Had the widow power to invade the corpus, such would be so highly improbable (in view of the surrounding circumstances) as not to render the bequest to charity uncertain.

3. The will has been twice construed by the Superior Court of the State, having jurisdiction of the estate, and the construction was in accordance with the laws of the state and should be adopted.

SUMMARY OF ARGUMENT

I.

The general rules of construction which are particularly applicable to the construction of the Welch will are:

A. The intention of the testator is to be determined from an examination of the entire instrument.

B. The Welch will is to be distinguished from wills wherein express power of invasion of the corpus is given. In the Welch will there is an express estate for life to the widow, express estates in remainder, but no express power to the widow to invade the corpus.

(1) The Washington cases cited by the appellants are not in point because they construe wills where express power of invasion was plainly given, or where the question of invasion was not an issue in the case.

C. Charitable bequests are favorites of the law. If there are two meanings to a word—one of which will effectuate and the other will defeat the charitable object, the former should be selected.

II.

Discussing, in the light of the whole will and the surrounding circumstances, the particular words from which the appellants imply the power to invade:

A. "No limitation in any expenditures for any purpose."

(I) The power of disposition must be expressly given and does not arise by implication generally, and words are strictly construed to protect the remainderman.

(II) The words do not confer any power to invade the corpus, either express or implied.

B. "Or any accounting be made."

(1) This provision means no more than that an accounting could not be required as

long as the widow managed her life estate in good faith.

C. "The then remainder."

(I) The other portions of the will indicate that the "then remainder" means the residue after carving out certain sums and adding unused income.

III.

Invasion is highly improbable in view of the circumstances of the widow.

IV.

The construction of the will by the Superior Court of the State of Washington is correct and should be adopted.

ARGUMENT

This controversy arises over the erroneous construction placed by the appellant on an isolated portion of the will of George T. Welch without giving the proper consideration to the intent of the testator.

The appellee filed an original estate tax return with the collector of internal revenue and paid $146.50 estate tax to him on the basis that the widow, a life tenant, had no powers to invade the corpus, and the total amounts set aside in the will for charitable purposes, to-wit: $12,500.00 for Board of Conference Claimants, Inc., of the Methodist Church and $159,035.74 residue (including a $30,000 bequest) was fixed and ascertainable at the time of the decedent's death and therefore deductible item.

After much discussion with the Bureau of Internal Revenue the appellee paid an additional estate tax and interest with the understanding that a claim for refund would be filed for the entire amount. The district court agreed with the appellee that the widow had no right of invasion and said items were deductible and gave a judgment for the appellee for the amounts so paid. The will set up complete machinery for the handling of the residuary amounts, for the benefit of old people principally, and showed that the testator had carefully planned for the use of his money for charitable purposes, and had contemplated that someone else, evidently his wife, would later join in building, in memory of both of them, a home for old folks.

CONSTRUCTION OF WILLS "BY THE FOUR CORNERS"

Appellant's brief is largely taken up with consideration of less than one sentence of paragraph V of the will. It reiterates and repeats the language of a segment of Paragraph V throughout the brief seeking a strained and unrealistic construction and ignoring the patent fact that the most important provisions of the will precedes and follows this isolated portion. This ignores rules laid down by the courts for construction of wills. The Washington State Supreme Court has so held:

> "The will should be construed so as to give effect to the intention of the testator, and in ascertaining the meaning of the particular words, phrases, clauses or paragraphs, the intention of the tes-

tator, is to be determined from an examination of the entire instrument."

Bank of California v. Turner, 193 Wash. 270, 273.

See also:

Colton v. Bank of California, 145 Wash. 503, 506;

Cowles v. Matthews, 197 Wash. 652.

In the Welch Will the widow takes an estate "for and during her lifetime" (R. 12) being a life estate, and expressly and repeatedly referred to elsewhere as such (Paragraphs VI, VII, VIII, and IX of Will) and there is nowhere to be found an *express* power on the part of the life tenant to invade the corpus.

The appellants make the bold assertion that the decision of the state court is contrary to the law of the State of Washington as determined by its highest court (Appellant's brief 9). In the cases cited by the appellants to support their assertion, the will or other instrument construed gave the life tenant the power to alienate the corpus of the estate or deplete or even exhaust the remainder either by express words to that effect or by implication so plain it is not subject to question. (4.)

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(4) Cases cited by appellant are:

In re Gochnour's Estate, 192 Wash. 92. The will read: "to my husband . . . with full power to *alienate* the same for his own use and benefit during his natural life and I direct that at the death of my said husband, Jacob B. Gochnour, all of my said property . . . then remaining go

Furthermore, the appellants pick out the few words in the Will that will best suit their purpose, and then forget the rest of the instrument. The effect of such interpretation is to drain off as taxes a substantial portion of the assets intended by the testator for the charities. This is contrary to the intent of Congress and to the well established rule that charitable bequests are the favorites of the law.

Young Men's Christian Assn. v. Davis, 264 U. S. 47; 68 L. ed. 558; 4 A. F. T. R. 3806.

St. Louis Union Trust Co. v. Burnet (8th C. C. A.) 59 Fed. (2) 922; 11 A. F. T. R. 626, where it is said:

. . . to my nieces and sister." (Italics supplied.

In re Bolstad's Estate, 200 Wash. 31. The opinion says: "under the terms of the trust agreement, the trustee may *use* the *principal* and *income* for the care and maintenance of the cestui que trust." (Italics supplied.)

In re Ivy's Estate, 4 Wash. (2) 1. The opinion says: "Under . . . the trust agreement the trustor, or the survivor, may, with the approval of the trustee, *amend* or *revoke the trust agreement.*"

Porter v. Wheeler, 131 Wash. 482. The will read: "I gave . . . to my wife all the balance of my property . . . to be used and enjoyed by her during her lifetime; and at her death, I will that all of said property not used for her support and comfort go to my son . . ."

The question as to the widow's power to invade was not in the case. Evidently the parties conceded that she had such power; the issue was whether the powers of life tenant were not so broad as to give absolute ownership.

> "If there are two meanings to a word, one of which will effectuate and the other defeat the testator's object, the Court will select the former."

The Washington State Supreme Court has adopted the rule that charities are favored:

> De LaPole v. Lindley, 118 Wash. 398.

LIFE ESTATE AND "EXPENDITURES"

When, in paragraph V, Mr. Welch gave property to his wife "for and during her lifetime" he gave a life estate, and by that name he repeatedly refers to it thereafter in the will. (See R. 13, 15, 19, and 22, where appears the expression "subject to the life estate hereinbefore given" to Carrie Welch.) (Uses "life estate" at R. 20.)

The ordinary life tenant has the implied power to expend income and under certain circumstances has the duty to do so. Expenditures for general taxes, repairs, and upkeep on the properties, are expenses fairly incidental to the maintenance of the realty used by the life tenant and are payable by him. (In re Albertson, 113 N. Y. 434, 21 N. E. 117, quoted in Stahl v. Schwartz, 81 Wash. 295.)

If the life tenant is to have power to do more than that, such power must be clearly given.

> "The power of disposition in a tenant for life under a will must be expressly given as it does not generally arise from implication . . . It is usually construed strictly" . . . "and will be

confined to the protection of the remainderman to the purpose for which it was given."

Thompson on Real Property, 1924 Ed. Vol. 3, Sec. 2214.

Burnet v. Burnet (Mo.) 148 S. W. 872, where it is said:

> "The principle to be extracted from these cases is that where a life estate is created whether by implication or by express words, with a remainder over, the power of the life tenant to defeat the remainder depends upon . . . the superadded power of disposition expressly or impliedly from the will, that such additional power will be strictly construed, and confined to its exact intendment, and any attempted exercise thereof beyond its just scope will not affect the rights of the remaindermen."

The isolated expression "that no limitation is placed on my said wife in any expenditures" is not a grant of power, at all. It does not give power to do anything. Words in paragraph V, "with the distinct understanding that no limitation is placed on my said wife in any expenditures she may make for any purpose" (R. 12), are added for emphasis only. The court might say of this language in Mr. Welch's will what was said of certain expressions in the will of another successful Washington business man:

> "The testator here, although presumed to know the law, seems to have taken special pains to make his intentions clear . . . by adding . . . words . . ."
>
> (Davis v. Brown, 112 Wash. 129.)

See also:

Wyant v. Lynch, 140 S. E. 478 at 488.

The trustee, under the will was given express powers to invade, sell or otherwise dispose of the property constituting the corpus of the estate. (See paragraph IX of the will. R. pp. 22-27).

The will expresses this power granted to the trustee, and significantly, not granted to the life tenant, in the following words:

> "My trustee is hereby directed to take out of my trust estate . . . either out of the principal and/or out of the net income . . . (paragraph IX (a) of will).
>
> "My said trustee . . . is hereby authorized . . . to expend out of the principal and/or out of the net income . . . (paragraph IX (c) of will.)
>
> "To grant, bargain, sell, exchange and lease and . . . to pledge, assign . . . partition, sub-divide and distribute . . . the income and principal of my said trust estate." (Paragraph IX (b) (2) of will).

If the testator wanted the widow to have the same powers as the trustee why did he not say so? The difference in the words used is a distinguishing mark by which he sets the trustee and the life tenant each in its place in his scheme for the disposition of his estate.

What the testator apparently meant by the words "no limitation . . . on expenditures . . . without accounting be made thereof" was that if the widow

wanted to use any sum of money out of the income from his estate in managing her affairs she should not be required to seek the approval of someone else before acting. Unsolicited advice would be meddling. The implication is that he wanted her to have the same independence that he had in seeking advice. (R. 182.)

Should she not use or expend all the income from his estate, then, under the provisions of decedent's will, the *then remaining* unused income would vest in the trustee for charitable purposes. Mr. Welch gave his widow only so much of the income as she would expend and no more, and there can be no doubt about this when we consider the language of the will as a whole. (See R. pp. 10, 13, 16, 17, 19, 25 for references to "unused income" by testator; particularly paragraph IX (d) of Will, R. 25).

The word "expenditures" as used in paragraph V of the will, by common understanding generally contemplates "paying out."

> Suppinger v. Enking (Ida.), 91 P. (2d) 362, Syllabus (1);
>
> In re: Holmes' Estate, 289 N. W. 638, 641, Syllabus (7).

Expend—Expenditure. "A man cannot spend which he has not got. He can mortgage or pledge but he cannot actually spend. per Kekewich J." Strouds Judicial Dictionary.

Expenditure—The act of expending, disbursements, money expended, laying out of money; payment. 25 C. J. 172.

The word expenditure is used in Poole v. Kane, 61 N. Y. S. 199 in sense of payment.

To Expend implies receiving something in return —In re: Holmes Est., 289 N. W. 638.

Expenditure means expend, to pay out, use up, consume—Black's Law Dictionary.

Expend is not a gift—Davison v. Safe Deposit & Trust Co., 63 Atl. 1045.

The Commissioner of Internal Revenue uses it in the common sense, in Article 31 of Estate Tax Regulations No. 80, which provides:

> "a reasonable expenditure by the executor for a tombstone . . . monument, mausoleum or for a burial lot . . . may be deducted."

The testator himself uses the word in that sense elsewhere in the Will. For instance, he authorizes the trustee "to expend . . . sufficient to erect or assist in the erection of a building" (R. 24) and "to expend so much of the net income." (R. 13).

The testator apparently had in mind that his widow should not be restricted in managing her affairs and, therefore, placed no limitations on payment of expenses incurred. There is a difference between the right to make "expenditures" and the position of appellants that the widow was granted the right to alienate the corpus.

We cannot improve upon the explanation the trial court gives:

> "It is evident that the testator wished to free his invalid wife during her short expectancy, in the event she should survive her husband at all, from being under the fear that she would be interfered with as to such expenditures as she might make of the income and from the fear that she would be required to make any accounting of such expenditures of the income. In the closing paragraph of his will the testator used these words: 'In order that my said wife, Carrie Welch, may be relieved of the responsibility in the administration upon my estate and the responsibility incident thereto, I do hereby nominate and appoint my said trustee . . . the executor of this my last will and testament . . .' "

Baker-Boyer National Bank v. Henricksen, 46 F. Supp. 831, at 836.

As further indication that the testator did not intend his widow to disturb the corpus, we call attention to the language in the Will wherein the testator directed that the trustee was:

> "To hold, maintain, and indefinitely retain so much as it believes it is advisable so to do, in which it shall be the sole judge thereof, the identical securities, properties or investments received by it from my estate, whether it be at my death or at the death of my said wife, Carrie Welch." (Par. IX (a) of Will R. 25).

Likewise, the testator intended that the two trust funds should include:

> "Cash or the equivalent in value in securities found in my estate (R. 16, 19)"

so apparently he did not intend the widow to invade them.

In this connection, while we deem it unnecessary in this case to supply any words in the interest of clarity in the construction of the Will, we wish to state the Courts do have the power to supply words in a Will whenever necessary to effectuate the testator's intention as expressed in the Will.

In re:

Peters' Estate, 101 Wash. 572.

The words "of income" might very properly be supplied in the will under consideration immediately following the term "expenditures" in paragraph V thereof. But this is unnecessary, we submit, in order to reach the same result from the language of this will.

Smith v. Bell, 6 Peters 68; 8 L. Ed. 322;
Russell v. Werntz, 44 Atl. 221.

LIFE ESTATE AND "OR ANY ACCOUNTING"

In Boden v. Johnson, 47 S. W. (2d) 155, the will provided that a mother would not be required to account for expenditures for the benefit of the children of the decedent. She diverted some of the income of the estate, and in an action challenging her right to do so, the court held that while she did not have to account for the *expenditures* she was required to use the income for the children's benefit.

In Tilton v. Tilton, 47 Alt. 256-257, the court says:

"If she should attempt to divert the property from them by fraudulent or unauthorized man-

agement or appropriation they would have a remedy in equity. So long as she manages and uses it according to her rights the plaintiffs have no cause to complain or to call her to account."

LIFE ESTATE AND "THEN REMAINDER"

In Paragraph V of the will, the testator directed that in event Mrs. Welch survived him the *"then remainder"* (R. 12) . . . "save and except my community undivided one-half interest in certain lands . . . which I hereinafter give . . . unto my son" shall be given over unto the trustee; and the testator next provided in the same Paragraph V (R. 13) that, should he survive her, then *"then* rest, residue and *remainder* of my estate," save and except the same farm, shall be given over unto the trustee. (R. 13) (Italics supplied). The appellants (P. 16) in their brief say that the phrase "then remainder" connotes the possibility of the corpus having undergone a quantitative change during the tenure of the life estate. Then, what does "then . . . remainder" mean, if Mr. Welch died first, and there was no preceding life estate? Appellee attaches the same meaning to this phrase in both instances, that is: The "then remainder" in each instance mean the estate plus any additions of unused income, and less bequests carved out of the estate. Like the expression "all the remaining property constituting my estate at her death" in Mead v. Welch, 95 F. (2) 619, the "then remainder" means, in each instance, "the estate remaining after the sum specified . . . had been carved out rather than to have reference to so much of the estate as may be left uncon-

sumed by the first taker." There were "sums specified to be carved out" in the Welch estate, that is, the two $500 bequests (P. IV, R. 12) and any remaining unused income was to be added thereto (R. 25, d; R. 10).

INVASION HIGHLY IMPROBABLE

The appellants take the position that it is not possible to say, as of the testator's death, that it is improbable that the life beneficiary would invade the corpus (Brief, 34).

We do not concede that the widow had any power or authority under the will to invade the corpus, at any time. But assuming solely for the purpose of considering the appellant's argument, that the widow had such power, our position is that the probability of her exercising it was remote, in view of her independent means, advanced age, frugal habits, modest home and of her income from the life estate; and in view of the further fact that she could not pass a marketable title.

The circumstances as to the widow's means, age and her habits of living have all been taken into consideration in other cases in considering the probability of invasion.

Ithaca Trust Co. v. U. S., 49 S. Ct. 291; 73 L. ed. 647;

Mead v. Welch, 95 F. (2) 617; (9th Circuit) (Opinion by Judge Healy).

As this court said in Commissioner of Internal Revenue v. Bank of America National Trust & Savings Association, decided Feb. 25, 1943; 133 Fed. (2d) 753:

> "Naturally, cases arising under this statute present gradations of probability; and we do not wish to be understood as suggesting that charitable bequests in remainder are deductible where there is real likelihood of an undetermined part of the corpus being taken for the benefit of the life tenant. It is the duty of the Commissioner, in administering this statute, to give effect to the beneficent purpose of Congress, and we believe a proper performance of the duty requires that attention be paid to the actualities of each case, The administrative difficulties in the way of doing that are not insurmountable. On the other hand, a blind adherence to arbitrary standards must result in many instances in the needless frustration of the legislative policy.
>
> "The judgment of the Board is affirmed." (opinion by Judge Healy).

See also:

U. S. v. Provident Trust Co., 54 S. Ct. 389, 78 L. ed. 793;

Comm. v. Bonfils Trust, 115 F. (2) 788.

As to the possibility of her giving marketable title, we cite:

Brandt v. Virginia Coal Co., 3 Otto 326; 23 L. ed. 927;

West v. American Tel. and Tel. Co., 311 U. S. 223; 85 L. Ed. 139, 132 A. L. R. 956;

Graves v. Bean (Ark.), 141 S. W. (2) 50.

EFFECT OF CONSTRUCTION BY PROBATE COURT

The will has been construed by the Probate Court on two occasions, and by the interested parties; and the Inheritance Tax Division of the State of Washington accepted the construction of the will by the Superior Court without appeal. The construction by the probate court is entitled to great weight.

> "By that instrument (constitution) probate courts were superseded and jurisdiction 'given in all matters of probate' was vested in the superior courts. In dealing in matters of probate, therefore the superior court does not require aid of any other court or the aid of any form of procedure to fully adjudicate the matters before it. In such instance it exercises all of its powers as a court of general and superior jurisdiction, and when the justice of the matter requires it do so, it may enter in the proceeding itself such orders and judgments as the necessity of the matter requires."

In re:

Gardella, 152 Wn. 250-256. (Word in parenthesis supplied)

One of the occasions the Court construed the will was when the Decree of Distribution was entered.

A Decree of Distribution is a final adjudication of the rights of the parties interested in the probate proceedings.

Golden v. McGill, 3 Wash. (2) 708;
Farley v. Davis, 10 Wash. (2) 62.

Where testimony was taken and judicial discretion exercised there was no waiver of rights, and such a decree is not a consent decree.

Harter v. King County, 11 Wash. (2) 583.

There has been no showing of collusion between the parties in connection with the entry of either of the probate orders.

Final decision of state courts of general jurisdiction under similar circumstances have been held to be conclusive.

Comm. v. Blair, 57 S. Ct. 330; 81 L. Ed. 465;
Helvering v. Rhodes Est. (8 C. C. A.) 117 Fed. (2) 508;
Uterhart v. U. S., 240 U. S. 598; 36 S. Ct. 417; 60 L. Ed. 819;
Freuler v. Helvering, 291 U. S. 35; 54 S. Ct. 308; 78 L. Ed. 634;
Sharpe v. Commissioner, 107 Fed. (2) 13;
Hoxie v. Page, 23 Fed. Supp. 905;
West v. Am. Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139.

As a court of general jurisdiction the Superior Court for Walla Walla County was endowed with all the power necessary to determine property rights of the interested parties, construe the will, instruct the trustee (See: Comm. v. Blair, supra) and if necessary to make a final determination of the inheritance tax, and when it exercised that power, the persons affected thereby are bound by the court's decrees. If

such decrees are in accordance with the laws of Washington, the federal government should follow them in those cases where the state law applies, and if they decided property rights, the federal government should be bound by them. Judge Paul, who heard these matters in the Supreme Court had long been on the superior court bench (Appointed June 23, 1934, 178 Wash. —List of Judges of the Superior Court). Judge Black had also been a probate judge (189 Wash. name appears in List of Judges). Three years had elapsed since the death of George T. Welch and the estate was confronted with 24 percent cumulative interest on an overhanging proposed inheritance tax of approximately $35,000. The audit of the internal revenue agents had been accepted by the executors, the additional estate tax had been paid, and yet the State had not closed its inheritance tax. The only recourse for the executor was to ask for a final adjudication and final determination of all questions involved. The hearing was regular, indicating testimony was taken, argument of counsel heard, and over a year has elapsed and no appeal has been taken by the State, which was brought in by a citation, as prayed for in the petition. There was no provision of law to require the presence of the United States revenue officials on such matters in state courts.

CONCLUSION

The decision of the trial court is presumptively correct, and the findings of the trial court will not be set aside unless they are clearly wrong.

The Quarrington Court, 122 Fed. (2) 266 at 267.

We submit that the judgment below should be affirmed, for the reasons stated herein.

Respectfully submitted,

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

THOR W. HENRICKSEN, formerly Acting Collector of Internal Revenue for the District of Washington, and CLARK SQUIRE, Collector of Internal Revenue for the District of Washington, *Appellants,* vs. BAKER-BOYER NATIONAL BANK, a corporation, Executor of the Estate of George T. Welch, deceased, *Appellee.*	No. 10,409 Jan. 5, 1944

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

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Before GARRECHT, DENMAN and HEALY, Circuit Judges.

GARRECHT, Circuit Judge.

There will be stated herein only such of the facts as relate to the question of whether or not the decree of distribution and the order construing it, both made by the Superior Court of Walla Walla County, Washington, are binding upon the appellants herein.

George T. Welch died on April 15, 1937, leaving an estate of $226,303. This amount represented one-half of the community estate, of which the other half under the laws of Washington belonged to the widow.

After providing for three cash bequests, Mr. Welch's will contained the following disposition:

> "I do hereby give, devise and bequeath unto my said wife, Carrie Welch, for and during her lifetime, should she survive me, all the rest, residue and remainder of my estate, both

> real and personal, including the rents, issues and profits therefrom, and of whatsoever the same may consist and wheresoever situated, with the distinct understanding that no limitation is placed on my said wife in any expenditures which she may make for any purpose, or any accounting be made thereof, with the then remainder over upon her death unto my Trustee, hereinafter named, in trust, nevertheless, for the uses and purposes hereinafter mentioned, * * *''.

Subject to the life estate thus created, Mr. Welch gave to his trustee, the appellee herein, $30,000, the income from which, if any, was to be paid, under the terms of the will, to the decedent's son, Fred B. Welch. Mr. Welch also devised to his son, subject to the widow's life estate, the testator's undivided one-half community interest in certain realty, as his son's absolute estate. A number of other bequests in trust were made, including one of $12,500 for admittedly charitable use by the Board of Conference Claimants, Inc., of the Pacific Northwest Annual Conference of the Methodist Episcopal Church.

All the remainder of the estate, subject to the widow's and other interests outlined above, was devised to the appellee in trust for the concededly charitable purposes of providing support or education for boys and girls, providing support for the poor, aged and infirm, and erecting a home for the aged as a memorial to the testator and his widow.

On April 7, 1938, the widow entered into a stipulation for the partition of the estate, the effect of which admittedly was to permit the widow to receive only the income from her husband's property. This stipulation was approved by Judge Timothy A. Paul of the Superior Court of Walla Walla County, Washington. The stipulation was made a part of the appellee's Final Account and Report and Petition for Distribution, which was in turn "in all respects allowed, approved and settled" by the Superior Court.

On May 9, 1938, the same Court entered its final decree in the Matter of the Estate of George T. Welch, Deceased, adjudging, among other things, that the partition just referred to was a "just, fair and equitable division" of the estate described therein.

On March 29, 1940, the same Superior Court, in an action entitled "In the Matter of the Estate of George T. Welch, Deceased, Baker-Boyer National Bank, a corporation, as Executor and Trustee, Petitioner, vs. State of Washington, Inheritance Tax and Escheat Division, Respondent," made an order holding that the State of Washington was "not entitled to assess inheritance taxes against the estate due to the fact that the charitable trusts created by the will of the decedent . . . were not limited to use in the State of Washington," and decreeing that the State was entitled to an additional inheritance tax of $3.16.

The above order contained the following language pertinent to the instant case:

> ". . . the executor and trustee herein having raised the question that he is entitled to instructions from the court directing as to the fund or interest chargeable under the laws of the State of Washington and the terms of said will of the decedent and the decree of distribution heretofore entered herein, the court hereby orders, adjudges and decrees and *construes the said will and decree of distribution:*
>
> "(1) That under the words, terms and provisions of the said will, *admitted to probate herein and made a part hereof by reference,* the widow of the decedent, Carrie Welch, is entitled to receive from the decedent's half of the community property distributed to the trustee by the decree of distribution on file herein; that under the words, terms and provisions of said will, the said widow Carrie Welch, received only a life estate with a vested remainder over to the remaindermen therein mentioned, and subject to the trusts therein created.
>
> "(2) That under the words, terms and provisions of said will the said widow Carrie Welch has no power to invade the corpus of said estate, but, during her lifetime, is entitled only to the net income above mentioned.
>
> * * *
>
> "(4) That the trustee shall not permit the corpus of the said estate to be invaded by the said Carrie Welch, but shall at all times manage and control said property in accordance with the terms of said trust with the powers therein given to it . . ." [Emphasis added]

No appeal was taken from the foregoing order of the Superior Court.

The appellee herein, as executor of the estate, filed an estate tax return with the appellant Henricksen, on a gross valuation of $226,303.96, and a net valuation of $7,325.42. The estate tax shown on the return and paid by the appellee was $146.50. The executor took as deductions in the return bequests for religious, charitable, scientific and educational purposes.

The Commissioner of Internal Revenue raised the gross valuation of the estate to $228,244.50, and increased the net estate to $180,301.68 by the disallowance of the above described charitable bequests, thereby increasing the estate tax by $21,417.55 over the tax of $146.50 already paid. This additional amount was paid to the Collector with interest on November 1, 1939, and January 9, 1940. On March 24, 1941, the appellee paid an additional assessment and interest, in the total amount of $1,165. Timely claims for refund were made, but were rejected by the Commissioner. On August 19, 1941, the appellee filed an action in the court below for recovery of the taxes paid, plus interest. The lower court entered a judgment for nearly the total amount claimed. From that judgment the present appeal has been taken.

Section 303 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by c. 209, 47 Stat. 169, § 807, and by c. 277, 48 Stat. 680, §§ 403(a) and 406, reads in part as follows:

> "Section 303. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—
>
> * * *
>
> (3) The amount of all bequests, legacies, devises, or transfers, * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes * * *."

Article 47, Treasury Regulations 80, contains in part the following language:

> "Art. 47. *Conditional bequests.*—
>
> * * *

> If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

The ultimate questions in this case as formulated in the language of appellant are:

(a) Did the will give the widow the right to invade the corpus of the estate?

(b) If so, were the bequests to charities sufficiently definite and ascertainable as of the date of the testator's death to be deductible in determining the net estate for estate tax purposes under Section 303(a)(3), supra?

As we have seen, the Superior Court of Walla Walla County held that the will did not give the widow the right to invade the corpus, and that the trustee under the will—the appellee herein—should not permit her to do so. If that order is binding upon the appellants and upon this Court, it is determinative of the instant case.

The appellants concede that the will should be interpreted in the light of state law, but deny that the order of the Superior Court of Walla Walla County is conclusive here. In Uterhart v. United States, 240 U.S. 598, 603, also a will case, the Government went farther in its admission. In that case the Court said:

> "It is very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (Knowlton v. Moore, 178 U.S. 41, 57), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."

In Knowlton v. Moore, 178 U.S. 41, 58, supra, which was followed in the Uterhart case, supra, quoted from in the preceding paragraph, Mr. Justice [later Chief Justice] White used the following emphatic and unequivocal language:

> ". . . the right to regulate successions [estates] is vested in the States and not in Congress."

In Freuler v. Helvering, 291 U.S. 35, 44-45, the court said:

> "We understand the respondent to concede the binding force of a state statute, or a settled rule of property, followed by state courts, and, as well, an antecedent order of the court having jurisdiction of the trust, pursuant to which payments were made. But, if the order of the state court does in fact govern the distribution, it is difficult to see why, whether it antedated actual payment or was subsequent to that event, it should not be effective to fix the amount of the taxable income of the beneficiaries. We think the order of the state court was the order governing the distribution within the meaning of the Act.
>
> "Moreover, the decision of that court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them."

The right of a trustee to request instructions from the court in a case of this kind, and the line of demarcation between the powers of a State court and a Federal court in tax matters involving the construction of wills, are succinctly discussed by Mr. Chief Justice Hughes in Blair v. Commissioner, 300 U.S. 5, 9-11:

> "*Second.* The question of the validity of the assignments is a question of local law. The donor was a resident of Illinois and his disposition of the property in that State was subject to its law. By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final. [Cases cited] It matters

not that the decision was by an intermediate appellate court. Compare Graham v. White-Phillips Co., 296 U.S. 27. In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between the parties the validity of the particular assignments. Nor is there any basis for a charge that the suit was collusive and the decree inoperative. [Case cited.] The trustees were entitled to seek the instructions of the court having supervision of the trust. That court entertained the suit and the appellate court, with the first decision of the Circuit Court of Appeals before it, reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.

"In the face of this ruling of the state court it is not open to the Government to argue that the trust 'was, under the Illinois law, a spendthrift trust.' The point of the argument is that, the trust being of that character, the state law barred the voluntary alienation by the beneficiary of his interest. The state court held precisely the contrary. The ruling also determined the validity of the assignment by the beneficiary of parts of his interest. That question was necessarily presented and expressly decided.

"*Third.* The question remains whether, treating the assignments as valid, the assignor was still taxable upon the income under the federal income tax act. That is a federal question."

See also Sharp et al. v. Commissioner of Internal Revenue, 303 U.S. 624, 625; Lyeth v. Hoey, 305 U.S. 188, 193; Hubbell v. Helvering, 8 Cir., 70 F.2d 668, 669; Commissioner of Internal Revenue v. Dean, 10 Cir., 102 F.2d 699, 701; Sharpe v. Commissioner of Internal Revenue, 3 Cir., 107 F.2d 13, 14, certiorari denied, 309 U.S. 665, 666; Helvering v. Rhodes' Estate, 8 Cir., 117 F.2d 509, 510; Plunkett v. Commissioner of Internal Revenue,

1 Cir., 118 F.2d 644, 648; Hidden v. Durey, [DC NY] 34 F. 2d 174, 178.

So in the instant case, the question of whether or not Mrs. Welch could invade the corpus of the trust estate was one for the courts of the State of Washington to decide. On the other hand, whether or not the charity bequests in the will are taxable in the event that it is determined that Mrs. Welch could not invade the corpus, is a matter for the Federal courts to adjudicate. The appellants concede, however, that "the nature of the widow's estate under the will" is a "question precedent to that of whether the amounts of the bequests to charity were ascertainable at the date of the testator's death and, accordingly, [whether] the amounts [were] deductible from the gross estate for estate tax purposes." In other words, if it is found that under the will, as interpreted by the state court, Mrs. Welch could not invade the corpus of the estate, a Federal court, interpreting the Federal tax statute, must rule that the appellee shall prevail.

The appellants complain that the order of the Superior Court of Walla Walla County "insofar as it is relevant here, was a non-adversary proceeding" and that "neither the widow nor the remainder interests [were] a party to the proceeding."

It has long been settled that a probate proceeding is one in rem, and that if the statutory provisions regarding constructive service and notice are observed, it is binding upon "all persons in the world". Seventy years ago the Supreme Court definitely endorsed the principle. In the case of Broderick's Will, 88 U.S. 503, 509, 519, the Court said:

> ". . . the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem,* in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction. The public interest requires that the estate of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with the last chance

of injustice and fraud; and that the result attained should be firm and perpetual.

* * *

"The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem.*" *

That constructive service is sufficient in proceedings that are in rem is hornbook law, established many decades ago by Pennoyer v. Neff, 95 U.S. 714, 727. In his monumental opinion, Mr. Justice Field said:

"Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, *or to partition it among different owners,* or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem." [Emphasis added]

The final decree of distribution in the instant case recites that "due and legal notice of the hearing upon said Final Account and Report and Petition for Distribution has heretofore been given by posting and by publication and as by law required and in full compliance with the Order of this Court," etc. As we have seen, that decree of distribution approved the stipulated partition between the community estate of Mr. Welch and that of his widow. Indeed, it is not questioned that all the required

statutory formalities were complied with in the probate proceedings that were had in the Superior Court of Walla Walla County.

The Supreme Court of the State of Washington has been emphatic in its pronouncements as to the sweeping and conclusive effect of orders and decrees of distribution.

In the case of In Re Daub's Estate, 190 Wash. 420, 427, the Court said:

> "This brings us to a consideration of the binding force of the decree of distribution. The decree was entered in a proceeding *in rem* and, proper notice having been given, was binding upon the entire world in respect of every question properly before the court for determination. [Case cited.] No personal notice was given to the remainderman of the hearing on the final account; but, the published notice having been given, no personal notice was required."

Again, in Farley v. Davis, 10 Wash.2d 62, 70-71, 76-77, the following language was used:

> "It is settled law in this state that orders and decrees of distribution made by superior courts in probate proceedings upon due notice as provided by statute are final adjudications having the effect of judgments *in rem*, and are conclusive and binding upon all persons having any interest in the estate and upon all the world as well. [Many cases cited.]
>
> "Such decrees cannot be attacked or annulled in any collateral proceeding, except for fraud. [Cases cited.]
>
> * * *
>
> "Appellant's next contention is that the property was sold without the actual knowledge of appellant or of any of the heirs. There is no statute in this state which requires that personal notice of sales of real property in probate proceedings be given to persons who are interested in the estate. The administration of an estate is a proceeding *in rem*, and when real property belonging to the estate is ordered to be sold, the statute requires only that notice of sale be given by posting and publication, whether the sale be by public auction . . ., or at private sale . . . Likewise, notice by posting and publication, only, is required with respect to the

hearing of the final report and petition for distribution. [Authorities cited.]''

See also In Re Ostlund's Estate, 57 Wash. 359, 364-366; Doble v. State, 95 Wash. 62, 69; In Re Nilson's Estate, 109 Wash. 127, 128.

Nor is this view of the Supreme Court of Washington regarding the binding effect of a probate order or decree confined to one in distribution only. In Krohn v. Hirsch, 81 Wash. 222, 227, the Court, after reviewing a number of its earlier decisions, said:

> ''These decisions also render it plain that this court holds that the statutory manner of giving notice preliminary to the rendering of orders and decrees in probate, although such notice is only constructive, that is, by publication and posting, amounts to due process of law, so that orders and decrees rendered in pursuance thereof are as binding upon all interested parties, so far as the subject-matter before the court is concerned, as if such parties were brought into court by personal notice. So thoroughly has this become the settled law of this state that further review and citation of authorities seems at this time unnecessary.''

Accordingly, since both the stipulated partition, approved by the decree of distribution, and the order made by the Superior Court of Walla Walla County, settled the extent of Mrs. Carrie Welch's interest in the corpus of the estate, and adjudicated that she did not have the power to invade it, we find that the charity bequests were sufficiently ascertainable to warrant their deduction from the gross estate for estate tax purposes.

The judgment of the court below is consequently affirmed.

(Endorsed:) Opinion. Filed Jan. 5, 1944. Paul P. O'Brien, Clerk.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO. 1/6/44—110.

No. 10409

In the United States Circuit Court of Appeals for the Ninth Circuit

THOR W. HENRICKSEN, FORMERLY ACTING COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON; AND CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, APPELLANTS

v.

BAKER-BOYER NATIONAL BANK, A CORPORATION, EXECUTOR OF THE ESTATE OF GEORGE T. WELCH, DECEASED, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

PETITION BY THE APPELLANTS FOR REHEARING

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

PETITION BY THE APPELLANTS FOR REHEARING

To the Honorable United States Circuit Court of Appeals for the Ninth Circuit and the Judges thereof:

The former Acting Collector of Internal Revenue for the District of Washington and the Collector of Internal Revenue for that District, the appellants herein, respectfully petition this Court to grant a rehearing of the above-entitled cause and to recon-

sider its opinion and decision filed January 5, 1944, and upon such reconsideration to set aside such opinion and decision. In support thereof the appellants respectfully show:

The issue before the Court in this case is whether the bequests to charities were sufficiently definite and ascertainable to be deductible in determining the net estate for estate tax purposes under Section 303 (a) (3) of the Revenue Act of 1926, c. 27, 44 Stat. 9. A question precedent to resolving that issue, as the Court agreed, is the nature of the widow's estate under the will as interpreted in light of state law.

It was held, however, that the decree of distribution approving a stipulated partition of the estate and a later order made by the Superior Court of Walla Walla County, construing the decree of distribution and the will, settled the extent of the widow's interest so as to preclude an interpretation of the will by this Court. That conclusion cannot rest upon the decree of distribution alone, and this Court did not so hold. We shall show that the later order has no bearing upon the question.

1. The final decree of distribution entered by the Superior Court of Walla Walla County sitting in probate (R. 138–164) insofar as it is here relevant merely approved a stipulation (R. 115–136) between the appellee as executor of the estate, and the widow for partition of the estate. If the tax were predicated on what the widow received by agreement, the decree would be relevant. But since the question here is the nature of the interests transferred at the decedent's

death, which the decree did not purport to determine, it is not. *Robbins* v. *Commissioner* 111 F. 2d 828 (C. C. A. 1st); *Watkins* v. *Fly,* 136 F. 2d 578, 580 (C. C. A. 5th); *Helvering* v. *Safe Deposit & Trust Co.,* 121 F. 2d 307, 314–315 (C. C. A. 4th); cf. *Taft* v. *Commissioner,* 304 U. S. 351, 357–358; *Dawson* v. *Commissioner,* 81 F. 2d 16, 17 (C. C. A. 2d). Thus in the *Robbins* case the Probate Court of Middlesex County, Massachusetts, entered a decree probating the decedent's will, issuing letters testamentary to the executors and directing them to administer the estate in accordance with the terms of the will and agreement of compromise. The agreement of compromise provided that Amherst College was to receive $250,000 subject to two life estates. The court held that the present value of the gift to the college was not deductible under Section 303 (a) (3) because (pp. 832–833)—

> it is clear that whatever rights Amherst College has now come to it through the compromise agreement and not under the will of the testator. The compromise agreement is not the will of the testator * * *.

What we have pointed out in no way detracts from the full implication of the line of authority marked by *Freuler* v. *Helvering,* 291 U. S. 35, and *Blair* v. *Commissioner,* 300 U. S. 5, relied on by this Court. It is true that a decision of a state court determining property rights is conclusive on the federal courts in tax litigation but obviously only when the rights so determined are those upon which the tax rests. What

this Court overlooked is that the tax is predicated on what passed at decedent's death, in this case determined by the will, and not by what interests the legatees agreed to accept in lieu thereof.

2. Nor is the order of the Superior Court of Walla Walla County dated March 29, 1940, construing the decree of distribution and the will entered almost two years after the final decree of distribution conclusive here. This Court in its opinion (p. 8) correctly stated a part of our objection to giving any effect here to that decree as follows:

> The appellants complain that the order of the Superior Court of Walla Walla County "insofar as it is relevant here, was a non-adversary proceeding" and that "neither the widow nor the remainder interests [were] a party to the proceeding."

The Court's answer to this contention was—

> It has long been settled that a probate proceeding is one in rem, and that if the statutory provisions regarding constructive service and notice are observed, it is binding upon "all persons in the world" * * *.

And then it pointed to the final decree of distribution which recites that due and legal notice of the hearing had been given by posting and by publication as required by law. But although the Court was indubitably correct that a probate proceeding, where proper notice is given, is binding on everyone, that principle is not an answer to our contention with respect to the order of the Superior Court dated March 28, 1940,

because that order was not entered in a probate proceeding. The proceeding was a suit by the appellee against the State of Washington, Inheritance Tax and Escheat Division. Although the record does not indicate, it was undoubtedly begun by service of process on the state as provided in Remington's Revised Statutes of Washington (Supp.), Sec. 11202–1k. Certainly there is no justification for the assumption that service by publication was had in a proceeding which was ostensibly one to determine the amount of state inheritance taxes owed by the estate and the order of the Court is to be contrasted with the decree of distribution in that it says nothing of any notice having been given to anyone. (Cf. R. 102 with R. 138–139.) Nor can it be assumed that the tax litigation was a part of the earlier probate proceeding in view (1) of Section 11202–1k of Remington's Revised Statutes of Washington (Supp.), which expressly provides that actions may be brought against the state by any interested party to determine whether property is subject to inheritance tax by serving the Tax Commissioner with summons by delivering a copy to the supervisor, and (2) the failure of the probate code to provide for the determination of the amount of inheritance tax owed in the probate proceeding itself. It follows then that the proceeding was not in rem and was not binding on the widow who was not a party. It could not establish her property rights and accordingly has no effect here. See *Security First Nat. Bank of Los Angeles* v. *Commissioner,* 38 B. T. A. 425; *Estate of Lloyd,* 106 Cal. App. 507; *Estate of Rath,* 10 Cal. 2d 399.

3. Even if there had been service on the widow, the order of March 28, 1940, nevertheless was ineffective to establish her interest. The law in the State of Washington as interpreted in an unbroken line of decisions of its Supreme Court, is that after a final decree of distribution has been entered by the probate court, it is final and conclusive unless altered on appeal. In adidtion to the cases cited at pages 10 and 11 of this Court's opinion, see *In re Cogswell's Estate,* 189 Wash. 433; *Coleman* v. *Crawford,* 140 Wash. 117; *Manning* v. *Alcott,* 137 Wash. 13; *Alaska Banking & Safe Deposit Co.* v. *Noyes,* 64 Wash. 672, 676. And this is the law as well after the adoption of the Washington Declaratory Judgment Act (Remington's Revised Statutes, (Supp.), Sec. 784–1), as before. *In re Cogswell's Estate, supra.* Accordingly, the Washington Supreme Court has held that after a final decree has been entered the Superior Court is without jurisdiction to make any changes (*In re Cogswell's Estate, supra*), and obviously if the final decree is conclusive the question of the nature of the widow's estate was moot. (*Alaska Banking & Safe Deposit Co.* v. *Noyes, supra*).

4. Even were the issue not moot, even had the Court jurisdiction to enter the decree of March 28, 1940, and even were the widow a party so that her rights could have been determined, the order of the Court is no more conclusive than the decree of distribution which it purported to interpret. Under the decree of distribution the wife had no power to invade the corpus, but as we have already emphasized, that de-

cree embodied an agreement of the parties as to their interests and not a determination of what passed at decedent's death. If, for the reasons outlined in our discussion of the decree of distribution, that decree is not relevant here, a subsequent order interpreting the decree and the will is similarly irrelevant. Unless the Court in its order of March 28, 1940, was free to ignore the stipulation and consider only the will, its interpretation had to be predicated on the will as embodied in the stipulation. Since there was clearly nothing illegal about the stipulation and decree, nor was any question raised as to its validity, the Court of necessity gave it effect. It was therefore not a construction of the will.

5. Finally, even on the assumption that the decree of distribution and the order of March 28, 1940, construed the interest passing at decedent's death rather than the property which the parties voluntarily agreed to accept, they are not conclusive here. *Freuler* v. *Helvering, supra,* suggested its own distinction in that the Court was careful to point out that (p. 45) "The decree purports to decide issues regularly submitted and not to be in any sense a consent decree." And the courts have consistently distinguished the *Freuler* and *Blair* doctrine where the state court did not purport to consider the case on the merits. *First-Mechanics Nat. Bank* v. *Commissioner,* 117 F. 2d 127, 130 (C. C. A. 3d); *United States* v. *Mitchell,* 74 F. 2d 571, 573 (C. C. A. 7th); *Doll* v. *Commissioner,* 2 T. C. 276, 284; *Journal Co.* v. *Commissioner,* 44 B. T. A. 460, 488; *Morris* v. *Commissioner,* 40 B. T. A. 988,

998; *Security First Nat. Bank of Los Angeles* v. *Commissioner,* 38 B. T. A. 425, *supra.* Cf. *Botz* v. *Helvering,* 134 F. 2d 538, 543–545 (C. C. A. 8th). See also *Scott* v. *Henricksen* (W. D. Wash.), decided May 29, 1941 (29 A. F. T. R. 1465, 1466), an oral opinion of Judge Black who decided the instant case below and in which he clearly recognizes the proposition we urge in a case which was not so clearly a consent decree as the instant one. Thus he stated:

> I am very conscious of the order that was made by the Superior Court, or I might better say the orders—one for eight months and the other extending it for four months additional. Those orders were made in connection with appearances by the counsel for the daughter and by the same identical counsel for the executors. Under such a circumstance I cannot feel that there was any issue presented to the Superior Court to that degree that would require me to hold that the Superior Court established the law in this state on that question. *I am satisfied that the orders were very agreeable to the beneficiaries of the Calvert estate and that same, in fact and equitably, should be binding upon the estate and the beneficiaries thereof as between themselves. I am not willing to concede, however, that the circumstances bind and control the taxing authority of the United States government.* [Italics supplied.]

There is no dispute and there cannot be any on this record that the final decree of distribution, insofar as it defined the widow's interest in the decedent's estate, gave effect to the stipulation of the parties (R.

115–116, 141–142) and was therefore a consent decree. The proceeding in which the order of March 28, 1940 was entered, was in form a contest between the executor and the State of Washington, but the only issue in which the state was interested was whether the charities were located in the State of Washington. The question of the nature of the widow's estate was not in issue under state inheritance tax law and the pleadings, order of the court, and correspondence between the executor and the state makes this clear. (R. 102–104, 166–173, 173–174.)

We are convinced that the opinion of this Court is erroneous because (1) it concluded that the probate decree had some bearing on the issue here, although it approved a voluntary settlement of the parties and did not determine the nature of the estate passing at decedent's death upon which the tax is predicated; (2) it concluded that the order of March 28, 1940, was a determination of the widow's interest because it was in *rem,* which resulted from confusing it with the prior probate decree; (3) under well settled Washington law, the Superior Court was without jurisdiction in any way to alter the prior final decree of distribution and the issue was moot because the final order of distribution was conclusive; (4) even if the Court had jurisdiction to enter its decree of March 28, 1940, it had no more significance than the final decree which it interpreted; and (5) both the decree of distribution and the order of March 28, 1940, were by consent and therefore not binding here. For these reasons and because the question is

of great importance to the revenue, we have felt impelled to depart from our usual policy of not filing petitions for rehearing.

We respectfully urge that a rehearing be granted.

Respectfully submitted.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
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Special Assistants to the Attorney General.

JANUARY 1944.

CERTIFICATE OF COUNSEL

The appellants herein, by their attorney, hereby certify that in their judgment the foregoing petition is well founded and is not interposed for delay.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 10413

United States
Circuit Court of Appeals
For the Ninth Circuit.

ARLEY VIRGLE TUDOR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona

Rotary Colorprint, 590 Folsom St., San Francisco

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
For the District of Arizona

C-6414 PHX

INDICTMENT

United States of America
District of Arizona—ss.

Violation: 50 U.S.C. 311 Selective Training and Service Act.

In the District Court of the United States in and for the District of Arizona, at the November Term Thereof, A. D. 1942.

The Grand Jurors of the United States of America, impaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that on the 8th day of May, 1942, at Glendale, Arizona, and within the jurisdiction of this Court, Arley Virgle Tudor, whose full and true name other than as given herein is to the Grand Jurors unknown, being then and there a person liable for training and service under the Selective Training and Service Act of 1940, and the amendments thereto, and having theretofore registered under said Act, knowingly, wilfully, unlawfully, and feloniously did fail and neglect to perform a duty required of him under and in the execution of said Act and the Rules and Regulations duly made pursuant thereto, in this, that the said Arley Virgle Tudor, having been classified in Class I-A by his local Board, being Maricopa County Local Board No. 6, created and located in Maricopa

County, Arizona, under and by virtue of the provisions of the Selective Training and Service Act of 1940, as amended, and the Rules and Regulations issued thereunder, and said defendant having been notified by said board to report at Glendale, Arizona, on May 8, 1942, for induction into the land or naval forces of the United States, the action of said local board, as aforesaid, being pursuant to the power conferred upon said board by the Selective Training and Service Act of 1940, and the amendments thereto, and the Rules and Regulations duly made pursuant thereto, did, knowingly, wilfully, unlawfully, and feloniously fail and neglect to report for induction, as aforesaid, as he was required to do by the notice and order of said board; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United [4] States of America.

F. E. FLYNN

[Endorsed]: Indictment A true bill, Sam W. Seaney Foreman.

[Endorsed]: Filed Jan 28 1943. [5]

In the United States District Court
for the District of Arizona

October 1942 Term At Phoenix

MINUTE ENTRY OF
WEDNESDAY, FEBRUARY 17, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

C-6414

[Title of Cause.]

Frank E. Flynn, Esquire, United States Attorney and James Walsh, Esquire, Assistant United States Attorney, appear for the Government. The defendant, Arley Virgle Tudor, is present in person with his counsel Wm. H. Chester, Esquire and now presents Motion to Quash Indictment. Argument is now had by counsel for the defendant, and

It Is Ordered that said Motion to Quash Indictment be and it is denied.

The defendant's plea is not guilty as charged in the indictment, which plea is now duly entered, and

It Is Ordered that this case be set for trial March 23, 1943 at ten o'clock a. m. [6]

[Title of District Court and Cause.]

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the

defendant Arley Virgle Tudor Guilty in the manner and form as charged in the indictment.

H. W. CHAMBERS,
Foreman.

[Endorsed]: Filed Apr 8 1943. [7]

In the United States District Court
For the District of Arizona
C-6414 Phoenix

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ARLEY VIRGLE TUDOR,
Defendant.

JUDGMENT

Due proceedings having been had on the indictment filed herein presented against the defendant above named charging a violation of Title 50, United States Code, Section 311;

It Is Ordered, Adjudged and Decreed that said defendant is guilty of said crime and in punishment thereof that said defendant be committed to the custody of the Attorney General of the United States or his duly authorized representative for imprisonment in such place of confinement as the said Attorney General shall designate for a term of three (3) years;

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Dated at Phoenix, Arizona, this 19th day of April, 1943.

DAVE W. LING
Judge

[Endorsed]: Filed Apr. 19, 1943. [8]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Offense: Violation of Title 50 U. S. C. Section 311 (Selective Training & Service Act)

Date of Judgment: April 19, 1943.

Brief Description of Judgment and Sentence: Verdict of guilty returned on April 8, 1943 of failing and neglecting to report for induction into the land or naval forces of the United States when notified so to do by his local Selective Service Board. Sentence of three years in Federal Penitentiary made and entered April 19, 1943.

Name of prison where confined if not on bail: On bail.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned upon the grounds set forth below.

ARLEY VIRGLE TUDOR
Appellant
W. H. CHESTER
Attorney for Appellant [9]

GROUNDS FOR APPEAL

I.

That the verdict is contrary to law.

II.

That the verdict is contrary to the weight of evidence.

III.

That the Court erred in the decision of matters of law and evidence during the course of the trial.

IV.

That the Court erred in sustaining objections to evidence offered by Appellant during the course of the trial.

V.

That the Court erred in matters pertaining to procedure and evidence during the course of the trial.

VI.

That the Court erred in overruling objections to evidence offered by the United States Attorney during the course of the trial.

VII.

That the court has misdirected the jury on matter of law.

VIII.

That the Court erred in that Title 50 U.S.C. Section 311 as construed and applied by the trial Court violates the Fifth Amendment to the United States Constitution and deprives the Appellant of liberty and property without due process of law and without opportunity to be heard.

IX.

That Title 50 U. S. C. Section 311 as construed and as applied by the trial Court violates the First and Fourteenth Amendments to the United States Constitution, and deprives the defendant of freedom of religion and due process of law. [10]

X.

That Title 50 U.S.C. Section 311 as construed and applied by the trial court violates the Thirteenth Amendment to the United States Constitution, and under such construction it subjects the defendant to involuntary servitude.

Respectfully submitted

W. H. CHESTER
412 Phoenix Nat'l Bank Bldg.
Phoenix, Arizona
Attorney for Defendant

Received April 19, 1943.

E. R. THURMAN
Asst. U. S. Attorney.

[Endorsed]: Filed Apr 19 1943 [11]

[Title of District Court and Cause.]

APPEAL BOND

United States of America
District of Arizona—ss.

Be It Remembered, that on this 19th day of April, 1943, the Honorable Dave Ling, Judge of the District Court of Arizona, personally came Ar-

ley Virgle Tudor, Principal and James Pazdera and Mildred Pazdera, his wife as surety and jointly and severally acknowledge themselves to owe the United States of America the sum of One Thousand Two Hundred Fifty and no/100 ($1250.00) Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the conditions hereinafter set forth.

Whereas, lately in the April, 1943 term of the District Court of the United States for the District of Arizona in a suit pending in said Court between the United States of America as plaintiff and Arley Virgle Tudor as defendant, a judgment and sentence was rendered against said Arley Virgle Tudor and said Arley Virgle Tudor has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in aforesaid suit, and notice of said appeal having been filed with the Clerk of the District Court of United States for the District of Arizona and a copy of said appeal served on the United States Attorney for the District of Arizona in manner and within time required by law and rules of court in such cases made and provided.

[12]

Now the Condition of This Recognizance is such that if Arley Virgle Tudor shall appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, State of California on such day or days as may be appointed by said Court, and upon such day or days as may be appointed by said Court until finally discharged therefrom and shall abide by and obey all orders

of the Circuit Court of Appeals and surrender himself in execution of judgment and sentence of the District Court of the United States for the District of Arizona if said judgment against him shall be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit and shall prosecute his appeal if he fails to make his appeal good, then the above obligation to be void, otherwise it shall be and remain in full force and effect.

And the surety or sureties in this obligation hereby covenants and agrees that in case of breach of any of the conditions of this bond, the United States District Court for the District of Arizona may upon notice to said surety or sureties of not less than ten days, proceed summarily in this cause to ascertain the amount of costs in the Circuit Court of Appeals for the Ninth Circuit, which said surety or sureties is bound to pay on account of such breach and render judgment therefor against said surety or sureties and to order execution therefor.

Judgment and sentence in this cause was entered on April 19, 1943 against Arley Virgle Tudor on a charge of having, on or about the 8th day of May, 1942, unlawfully and in violation of Section 311, Title 50 of the United States Code, failing to report for induction into the land or naval forces of the United States when notified so to do by his local Selective Service Board at Glendale, Arizona, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America. [13]

Sealed with our seal and dated this.....day of April, in the year of our Lord, 1943.

ARLEY VIRGLE TUDOR
Principal
Address .....

.....

Surety—James Pazdera.
Address—1430 N. 45 East St. Louis Ill.
Surety—Mildred Pazdera.
Address—1430 N. 45 St. E. St. Louis, Ill.

Subscribed and sworn to before me this 17 day of April, 1943.

[Seal] OSCAR L. BECKER,
County Clerk,
By THOMAS F. COOMAN,
Deputy

Approved this 19 day of April, 1943.
DAVE W. LING [14]

United States of America
District of Illinois—ss.

James Pazdera, whose name is subscribed to the foregoing instrument and undertaking as one of the sureties thereof, being first duly sworn, deposes and says: That I am a freeholder in said district and reside at No. 1430 N. 45th Street, East St. Louis, Illinois, and by occupation Forman Armour & Co. E. St. Louis, Ill.

That I am worth the sum of One thousand Two Hundred Fifty and no/100 ($1250.00) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and lia-

bilities and exclusive of property exempt from execution, and that my property now standing of record in my name, consists in part as follows: Real estate consisting of:

All of Lot 171, Block 22, Plat Town of Illinois City, Recorded in Record E on page 301 and 302 except the Northwesterly 55.45 feet and except the Southeast 21 feet thereof, St. Clair County, Illinois, East St. Louis Illinois.

That the encumbrances on the foregoing property are as follows: None except that I am now on Bond of Arley Virgil Tudor for trial in District Court of the United States of America for the District of Arizona, which bond expires at the time of, or prior to the time this bond is approved.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $7000.00.

That I am not surety upon outstanding penal bonds, now in force except on bond of Arley Virgil Tudor, which bond expires at the time this bond takes effect.

JAMES PAZDERA

Subscribed and sworn to before me this 17 day of April, 1943.

.....

United States Commissioner
for the District of Illinois.

At.....

[Seal] OSCAR L. BECKER,
County Clerk,
By THOMAS F. COOMAN,
Deputy. [15]

United States of America
District of Illinois—ss.

Mildred Pazdera, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says: That I am a freeholder in said district and reside at No. 1430 N. 45th Stree*d*, East St. Louis, Illinois, and by occupation a housewife.

That I am worth the sum of One Thousand Two Hundred Fifty and no/100 ($1250.00) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution, and that my property now standing of record in my name, consists in part as follows: Real estate consisting of:

> All of Lot 171, Block 22, Plat Town of Illinois City, Recorded in Record E on page 301 and 302 except the Northwesterly 55.45 feet and except the Southeast 21 feet thereof, St. Clair County, Illinois, East St. Louis, Illinois.

That the encumbrances on the foregoing property are as follows: None except my interest is as wife of James Pazdera who also signed this bond and except that I am now on bond of Arley Virgil Tudor for trial in District Court of the United States of America for the District of Arizona, which bond expires at the time of, or prior to the time this bond will be filed and approved.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $7000.00.

That I am not surety upon outstanding penal

bonds, now in force except on bond of Arley Virgil Tudor, which bond expires at time this bond takes effect.

MILDRED PAZDERA

Subscribed and sworn to before me this 17 day of April, 1943.

.....

United States Commissioner
for the District of Illinois
At.....

OSCAR L. BECKER,
County Clerk,
By THOMAS COOMAN,
Deputy. [16]

[Endorsed]: Filed Apr 19 1943. [17]

In the United States District Court
for the District of Arizona

April 1943 Term At Phoenix

MINUTE ENTRY OF
SATURDAY, MAY 15, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

C-6414

[Title of Cause.]

James A. Walsh, Esquire, Assistant United States Attorney, appears as counsel for the Governernment. Wm. H. Chester, Esquire, is present on behalf of the defendant. On motion of said counsel for the defendant,

It Is Ordered that defendant's time to file Bill of Exceptions herein be extended to and including June 9, 1943. [18]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that in the District Court of the United States, for the District of Arizona, the Honorable Dave W. Ling, Judge of said Court presiding, and Frank E. Flynn appearing as attorney for the plaintiff and W. H. Chester appearing as attorney for the defendant, the following proceedings were had:

That on the 17th day of Feby. 1943, the defendant filed the following Motion to Quash Indictment:

"(Title of Court and Cause)

Comes now the defendant above named and moves the Court to quash the indictment filed in the above entitled cause for the following reasons:

I.

That the indictment fails to state that the action of the Glendale, Arizona local selective service board acted in accordance with the rules and regulations of the Selective Service System.

II.

That the indictment fails to state that the defendant was subject to the orders made by the Glendale, Arizona local selective service board and

does not state facts sufficient to constitute a crime or offense.

W. H. CHESTER.
Attorney for Defendant.
412 Phoenix Nat'l Bank Bldg.
Phoenix, Arizona. [19]

POINTS AND AUTHORITIES

There are no facts alleged in the indictment to show that the defendant was required under the provisions of the Selective Service Act to report for combatant training. The U. S. Code Annotated, Book 50, Section 303 (g) provides "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form.

50 U.S.C.A. Sec. 303 (g)

Every fact necessary to constitute the crime charged must be directly and positively alleged and nothing can be charged by implication or intendment.

U. S. v Britton, 107 U.S. 655.
U.S. v Cruikshank 92 U.S. 542.

Commission from the indictment of any fact or circumstance necessary to constitute an offense will be fatal.

Harris v. U.S. 104 Fed (2nd) 41.

Indictment is so indefinite and uncertain that the

defendant cannot properly raise the Constitutionality of the Statute and is so indefinite and uncertain as not to provide a reasonable standard of guilt or innocence.

Indictment is in contravention of the 5th and 13th Amendments to the Constitution of the United States of America.

W. H. CHESTER,
Attorney for Defendant.
412 Phoenix Nat'l Bank Bldg.
Phoenix, Arizona.

That on the 17th day of February, 1943, said motion came on to be heard and on the 17th day of February, 1943, the Honorable Court entered its order denying said motion to quash the indictment.

That on the 8th day of April, 1943, upon the trial of said cause

THOMAS B. RIORDAN

was called as a witness on behalf of the plaintiff and testified as follows: [20]

Q. What is your business or occupation?

A. I am clerk of the Selective Service Board at Glendale.

Q. Who has custody of the records and papers belonging to the Board? A. I do.

Mr. Walsh: May this be marked?

(The document was marked as Plaintiff's exhibit 1 for identification)

Mr. Walsh: Q. Mr. Riordan, I hand you Government's Exhibit No. 1 for identification, and ask

(Testimony of Thomas B. Riordan.)

you if that is part of the records of your local Board No. 6? A. Yes, sir.

Q. Can you tell from looking at it on what date it was received by the Board?

A. No, I can't tell the exact date it was received, no, sir.

Q. Well, what is this notation here, (indicating on document)?

A. Well, that is the approximate date. At the time we received these cards they were shuffled and each man given a serial number, and after that was —the cards were serial numbered and then we put the dates—went through and put the dates on the cards. This card bears date of October 21st, 1940, however, we probably received that card several days prior to that date, but in handling and serial numbering it and everything, it took several days to do that.

Q. And since the date of its receipt has it been in the possession and custody of the Board?

A. It has.

Q. Is it regularly required by the Selective Service regulations to be kept by the Board?

A. Yes sir.

Mr. Walsh: We offer it in evidence.

Mr. Chester: No objection.

(The document was received as Government's Exhibit No. 1 in evidence)

Which document so proposed and offered in evidence by plaintiff is as follows:

(Testimony of Thomas B. Riordan.)

GOVERNMENT'S EXHIBIT 1 IN EVIDENCE

"Gen Del McLeansboro, 111 "No" 4/20/42
Serial Number 3033 ARLEY VIRGIL TUDOR
Order No 156 Address Route #1 Box 349, Glendale, Mara. Arizona. Age in years 31. Place of Birth Van Burn, Ark. [21]
Country or Citizenship. U.S. Date of Birth Dec 23, 1908. Name of person who will always known your address Mrs. Grace Irene Tudor, Relationship wife. Address of that person Route # 1 Box 349, Glendale, Mara., Ariz.
Employer's Name. Arena Notron, Inc. Place of Employment or business Phoenix, Maricopa County, Arizona.
I affirm that I have verified above answers and that they are true.

ARLEY V. TUDOR

(Back side of Card)

Description of Registrant

Race, White—Height 5'10" Weight 170 Complexion Dark. Eyes Brown, Hari Brown, Other obvious physical characteristics that will aid in identification—Small scar on right wrist.
Signed by Registrar Chas E. Mincks, Jr."

And the said Thomas B. Riordan testified for the plaintiff further as follows:

Mr. Walsh: Q. Mr. Riordan, referring to the address given on this card, "Route 1, Box 349,

(Testimony of Thomas B. Riordan.)

Glendale, Maricopa County, Arizona", is that within the territory over which your local board has jurisdiction? A. Yes sir.

Q. And referring to the number printed in red at the top of the card, what significance does that red number have?

A. That is the man's order number.

Q. And what relation or bearing does that order number have with reference to a man's questionnaire?

A. Well, the questionnaires are sent out numerically according to the order number. The files and the classification record is made up in numerical order according to a man's order number and we start with Order Number 1, send out the questionnaire to—in numerical order from thereon.

Q. Does the man's file in all proceedings retain that order number all the way through?

A. Yes, sir.

Mr. Walsh: May this be marked?

(The document was marked as Government's Exhibit No. 2 for identification) [22]

Mr. Walsh: Mr. Riordan, I hand you Government's Exhibit No. 2, for identification, and ask you if that paper is a part of the records of your Local Board No. 6 at Glendale? A. Yes, sir.

Q. Can you examine it and determine when it was received by the Board?

A. I would have to refer to my classification record to determine the date of mailing and the date it

(Testimony of Thomas B. Riordan.)

was received. I could not tell from this the date we received it.

Q. Is that the book which you have here?

A. Yes, sir.

(The book was handed to the witness)

The Witness: The questionnaire was mailed on November 5th, 1940, and was received by us on November 22nd, 1940.

Q. Has that document been in the possession and custody of the Board since its receipt on November 22nd? A. Yes, sir.

Q. And is it a record required to be kept by the Selective Service Regulations? A. Yes, sir.

Mr. Chester: There are two objections to this questionnaire, your Honor. One is that it has never been sworn to as provided within the rules and regulations, and the second is that the classification substituted.

Mr. Walsh: So far as the alteration of the classification is concerned, your Honor, I think their alter*at*ing the date is in accordance with the regulations of the Selective Service System. It is my understanding that when a classification is changed, the proper way to do it is to run through the original classification and then endorse on the questionnaire the new classification, *and then endorse on the questionnaire the new classification.*

The Court: Why, I think that would be all right. What about the other? Does that have to be sworn to?

Mr. Walsh: I think that is a matter which is up to the Board. If they want to insist upon it, they

(Testimony of Thomas B. Riordan.)

probably would require it, but I don't understand and can't understand why a defendant would be entitled to file a questionnaire without swearing to it and then attempt to claim he did not file the questionnaire because he had not sworn to it. [23]

Mr. Chester: Do you have any Selective Service Rules and Regulations in regard to that matter?

The Witness: No sir.

Q. The questionnaires are required, under the law, to be sworn to, are they not?

A. I don't think it is mandatory, no, sir.

Mr. Chester: Mr. Flynn, do you have a copy of the Section?

Mr. Flynn: I haven't it here.

Mr. Chester: I wonder if you could get one up.

The Court: Well, I will admit it now. You can look that up. It may be received now.

(The document was received as Government's Exhibit 2 in evidence)

Thereupon the following paper was offered and proposed in evidence by the plaintiff

GOVERNMENT'S EXHIBIT No. 2
IN EVIDENCE

(This exhibit being a selective service questionnaire of *Jarmon Conway,* gives the following answers to the questions therein in substantially the form as follows:

Order No. 156; Name Arley Virgil Tudor,

(Testimony of Thomas B. Riordan.)

Address RFD #1 Box 349, Glendale, Maricopa, Arizona.

My name is Arley Virgle Tudor.

My residence is R 1 Box 349, Maricopa (County) Arizona.

My telephone number is Glendale.

My social Security number is 526-10-4946.

I have physical or mental defects or diseases. My back is defected.

I am not an inmate of an institution.

I have completed nine years of elementary school and none years of high school.

I am working at present.

The job I am working at now is. Farm Labor.

I do the following work in my present job.

Tractor operator.

I have done this kind of work for 8 years.

My average weekly earnings in this job ar $15.00

In this job I am (x) an employee, working for salary, wages, commission, or other compensation.

My employer is: Stanley Fruit Co. Phoenix, Arizona.

Lat 22½ & J. Avenue, whose business is Farming.

I am not licensed in a trade or profession.

I am not at present an apprentice under a written or oral agreement.

Other facts which I consider necessary to present fa*ily* the occupation which I have described or my connection with it, as a ground for classification are Conscientious objector. [24]

(Testimony of Thomas B. Riordan.)

I have farmed for 15 years. I do not live on the farm with which I am connected.

I am not actually and personally responsible for the operation of the farm on which I work.

The principal crops and livestock of the farm I operate or work on are:

Lettuce 1100 acres; carrots, beets, 100 acres; 400 acres, Carrots 80 acres; Beef cattle, Hogs, I don't know number now on farm.

The number of hands employed on this farm is 24.

I am (x) Married. I married my present wife at Florence, Arizona on April 6, 1940. I do live with her.

I have four (4) children who are under 18 years of age or are physically or mentally handicapped.

Name sex age relationship date support began

Roy L. Tudor male 11 son March 7, 1929

Letha Davies female 11 step daughter April 2, 1940

Leo Davis Male 13 step son April 2, 1940

Patsy Davis female 3 step daughter April 2, 1940.

Grace Tudor female 42 wife April 2, 1940

Ella Tudor, female mother 56 1/1/30

The net cost to me for maintaining my home during the last 12 months after deducting all I could make contributed by other than myself for the support of such dependents was $.....

The cause of the dependency of any person 18 years of age: My mother is disable she has high blood pressure.

List of property

Grace Tudor Home $700.00 net income none

(Testimony of Thomas B. Riordan.)

I was born at Fortsmith, Ark., Crofford. (County)

I was born on December 23, 1908.

My race is white;

I am a citizen of the United States.

I x claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors because I am conscientiously opposed, by reason of my religious training and belief to the type or types of service checked below:

(Put X in the correct box or boxes)

X Combatant military service.

I have not been convicted of treason or felony.

Signed by Arley Virgle Tudor, Nov. 19, 1940.

(Not signed by officer or official administring oath)

[25]

Thereafter Witness Thomas B. Riordan testified as follows:

Mr. Walsh: Q. Referring to Government's Exhibit No. 2 in evidence, Mr. Riordan, can you tell us generally what that document is: just describe it.

A. This document is what is called the Selective Service Questionnaire. This is mailed to the registrant and he, in turn, has ten days in which to fill out and complete the answers in the questionnaire and return it to us. He gives all of the information on here that is asked, and from this questionnaire the local board classifies the registrant. In other words, they determine from the answers to the question in

(Testimony of Thomas B. Riordan.)
the questionnaire what class the registrant is entitled to be put in.

Q. From the Minutes to which you have just referred can you tell us what classification the defendant Tudor received from the Local Board No. 6?

A. At the first time this man was classified, was on November 26th, 1940. At that time the defendant was placed in Class 3-A, due to the fact he was a married man and had children. Subsequent to his classification we received, or I received word that the man was not taking care of his wife and children and was not living with them. I received that——

Mr. Chester (Interrupting) Your Honor, I object to that testimony as hearsay.

The Court: Who did you receive that from?

A. I received that from Mrs. Tudor, the man's wife.

Mr. Chester: The best testimony about that would be from Mrs. Tudor. It is purely hearsay evidence here.

The Court: Yes, that is true.

Mr. Walsh: I think, myself, Your Honor, that the witness should confine himself to receiving certain information which he conveyed to the Board.

The Court: Yes.

Mr. Walsh: Q. Was he subsequently reclassified from 3-A?

A. He was, he was reclassified on September 30th, 1941. At that time we had Rules and Regulations that came out that all men who were over the age of 28 years of age should be classified in 1-H so when the

(Testimony of Thomas B. Riordan.)

registrant Tudor's file came up for reclassification, we found he was over 28 years of age. As I say, that was on September 30th, 1941, so he was placed in Class 1-H. Subsequent to the Declaration of War, we received new Rules and Regulations stating that all men——

Mr. Chester: (Interrupting) Your Honor, I object, [26] to the question or the answer. The rules and regulations should speak for themselves, and this matter as to what the Rules and Regulations contained, I don't believe that the Member here is qualified to testify as to those Rules and Regulations.

Mr. Walsh: I submit he certainly is, your Honor. He is the Clerk of the Board, an executive officer of the Board and certainly he is entitled to testify as to what are the general present regulations and what the regulations were.

Mr. Chester: What was done pursuant to the regulations may be testified to, your Honor, but I believe as to what the regulations were is a matter of evidence where the rules will speak for themselves. It is not the best evidence.

Mr. Walsh: As far as that is concerned, the Court will take judicial notice of the Regulations.

The Court: Well, they would have the same effect as the Statute itself.

Mr. Chester: What is that?

The Court: I say, the Rules and Regulations have the same force and effect as the Statute?

Mr. Chester: That is correct.

The Court: All right. Now, if you are dissatisfied

(Testimony of Thomas B. Riordan.)

with the way they did, you can show the Court the rule and say they didn't follow it.

Mr. Chester: Well, the Statute itself—testifying as to what the law is or what the rule is, certainly is not the best evidence. The rule itself and the Statute itself is the best evidence.

The Court: It may be so, that part of it, but he can testify as to what they did.

Mr. Chester: He can testify as to what they did, but not as to what the Rules and Regulations are. These Rules and Regulations are not a matter of public property. They are hard to get. They are more or less private property for the Boards themselves, so we never know what the Rules and Regulations are.

The Court: Well it is a public document. Go ahead and testify.

The Witness: We received these new Regulations stating that all men classified in 1-H should be reclassified in Class 1, so——

Mr. Chester (Interrupting) Your Honor, I again object to this.

The Court: all right, let the record show your objection. Go ahead.

Mr. Chester: And an exception. [27]

Mr. Walsh: May this be marked, please?

(The document was marked as Government's Exhibit 3 for identification)

Mr. Walsh: Q. Mr. Riordan, I hand you Government's Exhibit 3 for identification, and ask you if

(Testimony of Thomas B. Riordan.)

that is a part of the records of your Board in this case? A. Yes; it is.

Q. And it is a record required by the Regulations of the Selective Service to be kept by your Board?

A. Yes; it is.

Mr. Walsh: I offer it in evidence.

Mr. Chester: No objections. At this time, your Honor, I'd like to receive an exception to the introduction in evidence to the questionnaire itself.

The Court: All right.

(The document was received as Government's Exhibit 3 in evidence)

Being as follows:

GOVERNMENT'S EXHIBIT No. 3
IN EVIDENCE

Report of Physical Examination:

Name, Tudor, Arley Virgle, Order No. 156, Race, White.

Occupation Farm Laborer.

Address: General Delivery, McLeansboro, Hamilton County, Illinois, Rural. Mother tongue, English.

Birthplace, Fortsmith, Arkansas, Birthdate December 23, 1908.

Statement of Person Examined.

Have you had any experience in CCC work? Yes.

Do you consider that you are now sound and well No.

What illness, disease, or accidents have you had since Childhood? Pneumonia, 1940

(Testimony of Thomas B. Riordan.)

Have you ever had any of the following? If so give dates; Spells of unconsciousness, convulsions, or fits? No. Gonnrehea No. Sore Penis No

Are you addicted to the use of habit forming drugs or narcotics? No. Have you ever raised or spat up blood. No.

When were you last treated by a physician, and for what ailment. Pneumonia, 1940.

Have you ever been treated at a hospital or asylum? No.

Signed by Arley V. Tudor.

This local Board finds that the person named above is:

Qualified for general military service

Date 2/13/42 J. F. BRAZILL. [28]

Thereafter witness Thomas B. Riordan, testified for the plaintiff further as follows:

A. Subsequent to this examination the defendant was called for an Army examination at the induction station in Phoenix.

Q. And did you get a report of that examination?

A. And we got a report of that examination; yes, sir.

Mr. Walsh: May this be marked?

(The document was marked as Government's Exhibit No. 4 for identification)

Mr. Walsh: Q. I hand you Government's exhibit No. 4 for identification, *as* ask you if that is the report of which you have reference to?

(Testimony of Thomas B. Riordan.)

A. Yes; it is.

Mr. Walsh: I offer it in evidence.

Mr. Chester: No objection.

(The document was received as Government's Exhibit 4 in evidence)

Which Exhibit so proposed and offered by Plaintiff is as follows:

GOVERNMENT'S EXHIBIT No. 4
IN EVIDENCE

Report of Induction of Selective Serviceman

Name, Tudor, Arley Virgle.

Address Phoenix, Maricopa, Arizona. Mother Tongue English

Birthplace Fort Smith, Arkansas. Birth date Dec 23, 1908.

Age 33 years 2 months. U. S. Citizen Yes. Race, white.

Grade completed in grammar school 6;

Duty with CCC no.

Civilian trade or occupation; Farm laborer, years so engaged 20; weekly wage $20.00

Marital status, married, Dependents; one-son.

Previous service in United States Military or naval service, Marine Corps, Coast Guard, or National Guard in any active, inactive, or reserve status; none.

Physical Examination:

1. Eye abnormalties none
2. Ear, nose, throat abnormalties none
3. Mouth and gum abnormalties none
4. Teeth

(Testimony of Thomas B. Riordan.)

5. Skin acne, slight.
6. Varicose veins none
7. Hernia none
8. Hemorrhoids none
9. Genitalia normal.
10. Feet normal
11. Musco-skeletal defects none
12. Abnrormal viscare normal [29]
13. Cardiovascular system normal
14. Lungs, including X-ray if make, normal
15. Nervous system reflexes pupillary normal Patellary normal
16. Endocrine Disturbances none
17. Results of laboratory examinations, when made Klein—Neg.
18. Remarks on defects not sufficiently described none
19. Summary of defects in order of importance, impression of physical fitness none

Vision Right eye 20/20 Left eye 20/20

Hearing Right ear 20/20 Left ear 20/20

Height 67 in.

Weight 168

Girth (at nipples: Inspiration 42 in; Expiration 39 in.

Girth (at unbilicus 33 in.

Posture good

Frame medium

Color of hair brown.

Color of eyes brown

Complexion ruddy

(Testimony of Thomas B. Riordan.)

Pulse: Sitting N.R. After exercise N.R.
2 min after exercise N.R.
Blood pressure; Systolic N.R. Diasolic N.R.
Urinalysis Sp gr. 1.020. Albumin neg. Sugar Neg
Microscopic N.R. other data none.
Signed by L. J. Fielding. 1st Lt. M.C.

Thereafter witness Thomas B. Riordan, testified as follows for the plaintiff:

Mr. Walsh: Mark this, please

(The document was marked as Government's Exhibit 5, for identification)

Mr. Wash: Q. I show you Government's Exhibit 5 for identification, and ask you if that is a part of the records of Local Board No. 6?

A. Yes, sir it is.

Q. Can you tell us whose signature appears at the bottom of it?

A. That is the signature of J. S. Brizill, the Chairman of Local Board No. 6.

Q. Directing your attention to the envelope attached to the sheet, do you know whether or not that was ever placed in the mail?

A. Yes, sir, it was.

Q. And enclosed in this envelope?

A. Yes, sir.

Mr. Walsh: I offer it in evidence. [30]

Mr. Chester: No objection.

(Testimony of Thomas B. Riordan.)

(The document was received as Government's Exhibit No. 5 in evidence)

Which said exhibit proposed by plaintiff is as follows:

GOVERNMENT'S EXHIBIT No. 5
IN EVIDENCE

Order to Report for Induction.

The President of the United States
To Arley Virgle Tudor, Order No. 156.

Greeting:

Having submitted yourself to a local Board composed of your neighbors for the purpose of determining your availability for training and service in the armed forces of the United States, you are hereby notified that you have now been selected for training and service in the Army.

You will, therefore report to the Local Board named above at 213 E. Glendale Av., Glendale, Ariz., at 6:30 a.m., on the 3rd day of April (Friday) 1942.

This Local Board will furnish transportation to an induction station of the service for which you have been selected. You will there be examined and if accepted for training and service, you will then be inducted into the state branch of the service.

If you are not accepted, you will be furnished transportation to the place where you reported. Wilful failure to report promptly to this Local Board at the hour and on the above named day in this notice is a violation of the Selective Training and

(Testimony of Thomas B. Riordan.)
Service Act of 1940 and subjects the violator to fine and imprisonment. Bring with you sufficient clothing for 3 days.

You must keep this form and take it with you when you report to your Local Board.

J. F. BRAZILLE,
Member of Local Board.

(attached is envelope as follows:
Selective Service,
Official Business. (P.O.Stamp dated Mar 23, 1942)
Important Orders

ARLEY VIRGIL TUDOR,
Gen Del
Phoenix, Arizona.

If not delivered in 5 days return to Local Board No. 6, Maricopa County 213 E. Glendale Ave. Glendale, Arizona.

Mar 29, 1942.
(Selective Service Stamp) [31]

Thereafter Witness, Thomas B. Riordan testified for the Plaintiff as follows:

Mr. Walsh: May I have this marked as one exhibit?

(The documents were marked as Government's Exhibit 6 for Identification)

Q. Can you tell us when the respective cards were received:

A. One card was received on April the 20th, 1942, and the other card was received on April 25th, 1942.

(Testimony of Thomas B. Riordan.)

Mr. Walsh: We offer them in evidence.

Mr. Chester: No objection.

(The documents were received as Government's Exhibit 6 in evidence)

Which exhibit so proposed by plaintiff is as follows:

GOVERNMENT'S EXHIBIT No. 6
IN EVIDENCE

One Postal Card:

(Postmarked McLeansboro, Ill,
Apr. 16, 1942.

Local Board No. 6,
Glendale Arizona.
E Glendale Ave.
(on reverse side)

Sending you my address. Arley Tudor, McLeansboro, Gen Del, Illinois. Arley Virgle Tudor, Order Number 156. 4-20-42

One Postal Card:

(Postmarked McLeansboro, Ill,
Apr 25, 1942.

Via Air mail

Maricopa County Local Board,
Glendale, Arizona.
East Gledale Ave.

(on reverse side)

Will send you another card concerning my address. this is two I have sent you. Arley V. Tudor, No. 156, McLeansboro, Illinois, Gen Del

(Marked in red ink #352 4-27-42 A.N. [32]

(Testimony of Thomas B. Riordan.)

Thereafter Witness Thomas B. Riordan testified for the plaintiff as follows:

Mr. Walsh: Q. Mr. Riordan, subsequent to the receipt by your Board of the two cards which have just been admitted in evidence, was any additional order to report for induction addressed to the defendant Tudor? Yes, sir.

Mr. Walsh: Mark that.

(The document was marked as Government's Exhibit 7 for identification.)

Mr. Walsh: Q. I hand you Government's Exhibit No. 7 for identification, and ask you if that is the order about which you have reference?

A. Yes; it is.

Q. And whose signature appears at the bottom of it?

A. That is the signature of J. S. Brizill, Chairman, Local Board No. 6, Glendale, Arizona.

Mr. Walsh: I offer it in evidence.

Mr. Chester: No objection.

(The document was received as Government's Exhibit No. 7, in evidence.)

Which said exhibit so proposed by plaintiff is as follows:

GOVERNMENT'S EXHIBIT No. 7,
IN EVIDENCE

Order to Report for Induction

To Arley Virgil Tudor, Order No. 156.

You will, therefore, report to the local Board

(Testimony of Thomas B. Riordan.)
named above 213 E. Glendale, Ave., Glendale, Arizona, at 6:30 a. m., on the 8th day of May, (Friday; 1942.

Signed by J. F. Brazill, Member of Local Board.
(with following notation below signature)

If it is impossible for you to return to Glendale, go to the nearest local board Immediately upon receipt of this notice and request transfer. [33]

Thereafter witness, Thomas B. Riordan testified as follows for the Plaintiff.

Q. Do you recall, Mr. Riordan, to what address Government's Exhibit No. 7 was addressed and mailed?

A. It was addressed to this McLeansboro, Illinois, address, the last address that we received from him.

Q. You heard nothing from him?

A. No, sir.

Mr. Walsh: May this be marked, please?

(The document was marked as Government's Exhibit 8 for identification.)

Mr. Walsh: Q. I hand you Government's Exhibit 8 for identification, Mr. Riordan, and ask you whose signature appears thereon.

A. That is the signature of J. S. Brazill, Chairman, Local Board No. 6, Glendale, Arizona.

Q. And is that document a part of the records of your Board in this case?

A. Yes; it is.

Mr. Walsh: I offer it in evidence.

(Testimony of Thomas B. Riordan.)

Mr. Chester: No objection.

(The document was received as Government's Exhibit 8 in evidence.)

Which exhibit so proposed by plaintiff is as follows:

GOVERNMENT'S EXHIBIT No. 8,
IN EVIDENCE

Notice (to Registrant) of Suspected Delinquency

To Arley Virgle Tudor.

Dear Sir:

According to information in possession of this Local Board, you failed to perform the duty, or duties imposed upon you under the selective service law as specified below.

(X) You Failed to Report for Induction on May 8, 1942, nor did you request a transfer as instructed. Order to Report Notice was not returned to us. You had also failed to report for induction on April 3, 1942.

You are therefore directed to report, by mail, telegraph, or in person, at your own expense, to this Local Board, on or before 2:00 o'clock P. M. on the 31st day of May, 1942. [34]

Failure to report on or before the day and hour is an offense punishable by fine or imprisonment, or both.

(Signed) J. F. BRAZILL,
Member of Local Board.

(Testimony of Thomas B. Riordan.)

Thereafter Witness Riordan testified as follows for plaintiff:

Mr. Walsh: May this be marked, please?

(The document was marked as Government's Exhibit 9, for identification.)

Mr. Walsh: We offer it in evidence.

Mr. Chester: No objection.

(The document was received as Government's Exhibit 9 in evidence.)

Which exhibit so proposed by plaintiff is as follows:

GOVERNMENT'S EXHIBIT No. 9
IN EVIDENCE

Classification Record.

1. Order No. 156. 2. Name of Registrant—Arley Virgle Tudor. 3. Serial Number 3033 4 age 31. 5. Race—Wh. 9. Date questionnaire mailed 1-15-40. 11 Date questionnaire returned—11-2-40. Classification 1-A. 15 Date Registrant Appeared for Physical examination Feb. 5, 1942. 16 Date Classification by Local Board mailed to Registrant. 2-13-42, 11-28-40, 10-2-41. 24. Date of order to report for induction—3-23-42 marked through 4-21-42.

25. Time Fixed for Registrant to report for transportation to Induction Station 5-8-42 6:30 p m, 4-3-42 6:30 p.m. (marked through)

27 Remarks: Reported to U. S. Atty. 7-10-42. 28 Order number 156.

(Insert page attached)

23A Date notice mailed to appear for physical

(Testimony of Thomas B. Riordan.)
examination by Armed forces 2-24-42. Under colume with blank heading 6-18-42.

Thereafter witness, Thomas B. Riordan testified as follows:

Mr. Walsh: Q. I hand you Government's Exhibit 9 in evidence, Mr. Riordan, and ask you if you will explain what the various entries on that document mean?

A. The first entry, 156, is the man's order number. That is followed by his name, Arley Virgle Tudor, and then his serial number 3033; age 31; race, White; date questionnaire mailed, 11-15-40; date questionnaire returned, 11-22-40; classification 1-A. Date registrant appeared for physical examination was February [35] 5th, 1942. Date classification by Local Board mailed to registrant, the first one was mailed on November 28th, 1940; the second one was mailed on October 2d, 1941 the third was mailed on February 13th, 1942. Date ordered to report for induction, the first order to report was mailed on March 23, 1942. The time fixed for registrant to report for transportation to induction station, date was April 3d, 1942, at six-thirty P.M. The second order to report was mailed April 21st, 1942, and the time fixed for the registrant to report for transportation to induction station was May 8, 1942, at six-thirty, P.M., and then in the next column under "Remarks, including information on appeals to President" and so forth, is marked: "Reported to United States Attorney 7-10-42" and then his order number appears again "156"

(Testimony of Thomas B. Riordan.)

Q. And the balance of the sheet?

A. And on this supplemental sheet is the date notice mailed to appear for physical examination by the armed forces was on February 24th, 1942, and the other date, June 18th, 1942 was the date that he mailed his occupational questionnaire to him, and that was never returned.

Thereafter, Witness

ANITA D. STODDARD

was sworn and testified on behalf of plaintiff as follows:

A. I am with the Selective Service Board as Assistant Clerk.

Q. And what particular board?

A. Board No. 6 Glendale.

Q. Do you recall, Mrs. Stoddard, the time when the defendant Tudor's final physical examination was received by the Board there at Glendale?

A. Yes Sir.

Q. What conversation did you have with him at that time?

A. Well, he told me that he had passed his Army examination and I said it would only be a matter of two or three weeks before he would be called for induction, and if so, what would be his address, and then he gave me his changed address of General Delivery at Phoenix. [36]

Thereafter the following proceedings were had:

Mr. Walsh: The Government rests:

Mr. Chester: At this time, your Honor, I'd like to make a motion and I believe that it should be made without the presence of the jury.

The Court: All right. Retire from the court room. Keep in mind the Court's admonition. Just remain out in the corridor.

(Thereupon the jury retired from the Court room.)

Mr. Chester: Your Honor, so far as I can see, the ruling of the Selective Service Board in this case, especially where they had notice that the man was a conscientious objector, was arbitrary and capricious, and they ignored their own Rules and Regulations and the laws of the Selective Service System itself. The classification, therefore, was a wrongful classification. It was not correct, at any rate, and they failed to go into the matter in a hearing as to whether or not his claim as a conscientious objector could be substantiated. There was no evidence taken so far as the testimony of Mr. Riordan is concerned, one way or the other.

Now, the exhibits that are before the Court, none of them have been properly tied up to the defendant. There is no one here who has stated that he knew that this was the defendant's signature. The questionnaire is not sworn to.

Now, the opinion No. 14 of the Selective Service System states that conscientious objectors should be treated in a certain way, which this Board has not done, and their Rules and Regulations provide for special treatment for conscientious objectors.

Conscientious objection is something that rests within the man's mind, and I believe that without a hearing and without going into the matter to show that the whole thing is before the Board, that they cannot properly classify him either as a conscientious objector or not a conscientious objector, but that it should be determined upon a fair hearing wherein they should consider both sides of the case. I move, therefore, that the case be dismissed.

The Court: Well, the defendant didn't do what he was required to do under the Regulations. In order to get that before the Board he should have filled out form 47, which he did not do. The motion is denied. Call the jury. [37]

Thereafter, Defendant

ARLEY VIRGLE TUDOR

was sworn and testified in his own behalf as follows:

Mr. Chester:

Q. Will you state your name, Mr. Tudor?

A. Arley Virgle Tudor.

Q. You are the defendant in this case?

A. Yes, sir.

Q. Where do you live?

A. I live in McLeansboro, Illinois.

Q. And what is your occupation?

A. I have been working in the oil fields there. My occupation is a farmer.

(Testimony of Arley Virgle Tudor.)

Q. And did you receive any orders from the Glendale Draft Board, I think it was in April, 1942?

A. I received an order for induction along about that time, but I am not positive of the day.

Q. Did you appear for induction?

A. I did not.

Q. Will you tell the Court why you did not appear for induction?

A. When I filled out my questionnaire I put it on there in two different places that I was a conscientious objector and I didn't really think it would be in any one—any human creature's power to tell whether or not I am a conscientious objector, and without me telling them that I am one, I don't know how they would understand that I am, and that is the reason I didn't report for induction in the United States Army.

Q. And to what faith do you belong?

A. I am Jehovah's Witness, Witness of the Jehovah God.

Q. Now, in that faith, what is the attitude toward participation in armed combat?

A. Well, the Almighty says that there will be no place in the Kingdom of God for murder, and he put the human creatures here on earth and they belonged to Him and I don't feel that it is up to me to destroy them. He says He will, when the time comes, and so far it has not come, but according to the Scriptures, it will be in the near future.

Q. Now, prior to the time that you were noti-

(Testimony of Arley Virgle Tudor.)

fied, do [38] you recall what classification you had in the Selective Service System?

A. You mean at the time of—that I got the report for induction? Q. Yes.

A. Well, according to what I received before my examination was 1-A.

Q. At the time you received that, did you have any dependents?

A. Yes, I had my mother and son, fourteen years old.

Q. Were they with you?

A. They were with me.

Q. How old is your mother?

A. She is fifty eight.

Mr. Flynn: I object to that, your Honor, that is no defense; immaterial and not within the purview of the issues.

The Court: The objection is sustained.

Thereafter

ELLA TUDOR

was called as a witness on behalf of defendant, and being first duly sworn, testified as follows:

Mr. Chester:

Q. Will you state your name?

A. My name is Ella Tudor.

Q. What relation are you to the defendant?

A. I am his mother.

Q. And do you live with the defendant?

(Testimony of Ella Tudor.)

A. Not since the law has been dragging him around. Until then I did.

Q. But until that time you did?

A. Yes, sir.

Q. Did you work? A. Me?

Q. Yes.

A. We both worked. We are supposed to work.

Q. What work did you have? [39]

A. I did housework. I worked for him, kept house.

Q. Kept house for him? A. Yes.

Q. And was there any others in the family?

A. His son—my grandson.

Q. How old is he? A. Thirteen.

Q. Does he live with you and Mr. Tudor?

A. He lives with me and his father.

Q. Up until the time he was brought back from Illinois? A. Until he was arrested.

Q. The son does not work, does he?

A. Sir?

Q. The son does not work, does he, the boy, does he work? A. The little boy?

Q. Yes.

A. Well, he goes to school.

Q. Is he living with Mr. Tudor now?

A. No, he isn't with us now. I brought him back here and sent him to his mother when they put him in jail. What could we do then? They broke up our home. We couldn't keep house and him in jail and us somewhere else.

Thereafter

J. S. BRAZILL

was called as a witness and testified on behalf of defendant as follows:

Mr. Chester:

Q. Will you state your name, Mr. Brazill?

A. John S. Brazill.

Q. What is your occupation?

A. Mortician and funeral director.

Q. And you are a member of the Selective Service Board of Glendale, are you not?

A. I am Chairman of the Selective Service Board No. 6.

Q. Do you recall the questionnaire of Arley Virgle Tudor? [40] A. Yes, sir.

Q. Do you recall that the questionnaire stated he was a conscientious objector?

A. Yes, a couple of "XX's" there, yes.

Thereupon closing arguments having been made the Court instructed the jury among other things as follows:

You are instructed that even if a Local Draft Board acts in an arbitrary and capricious manner, or denies a registrant a full and fair hearing, nevertheless the registrant must comply with the Board's order. The registrant may not disobey the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. In other words, the registrant may not lawfully disobey his Local Draft Board's order to report for induction and then offer as a defense for his failure to comply with the Board's order, some

arbitrary or capricious Act of the Board in determining his classification and issuing the order.

You are instructed that a registrant, under the Selective Service Act, who has deliberately refused to obey his Draft Board's order for induction may not, in defense to a charge of wilfully violating the Act, show that the Board erred in classifying him.

The defendant presents the foregoing as his proposed Bill of Exceptions in the above entitled matter, and prays that the same may be settled and allowed.

Dated this 9 day of June, 1943.

W. H. CHESTER
Attorney for Defendant,
412 Phx Natl. Bank Bldg.
Phoenix, Arizona. [41]

The foregoing Bill of Exceptions is correct and may be settled and allowed by the Court.

Dated: June 9, 1943.

FRANK E. FLYNN,
United States Attorney.

The foregoing Bill of Exceptions is correct and is hereby settled, allowed and approved.

Dated: June 9, 1943.

DAVE W. LING,
Judge United States
District Court.

[Endorsed]: Filed Jun 9, 1943. [42]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now the defendant above named, by his attorney, W. H. Chester, and says that subsequent to the institution of the above entitled cause and during the trial thereof on the 8th day of April, 1943, the Court committed manifest error in the admission of evidence and in the rulings upon motions of the defendant, and for his assignments of error specifies the following:

I.

That on the 17th day of February, 1943, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the indictment failed to state that the action of the Glendale, Arizona local selective service board acted in accordance with the rules and regulations of the selective service system or that the defendant was subject to the orders made by the Glendale, Arizona local selective service board. That the Honorable Court erred in denying said motion to quash, which order was entered on the 17th day of February, 1943.

II.

That the Honorable Court erred in admitting to evidence the Government's Exhibit No. 2 in evidence for the reason that said exhibit was a Selective Service Questionnaire that had not been executed in accordance with the rules of the Se-

lective Service System in that it had not been sworn to as provided by said rules. [43]

II.

That the Honorable Court erred in permitting testimony by Thomas Riordan as to what the Rules and Regulations of the Selective Service System were. (See pages 10, 11, 12, 13 of Reporter's Transcript). That such testimony could not be regarded as the best evidence and was not admissible.

III.

That the Honorable Court erred in instructing the jury that even if a Local Draft Board acted in an arbitrary and capricious manner, or denies a registrant a full and fair hearing nevertheless the registrant must comply with the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. It is the contention of the defendant that the Court is not bound to convict and punish one for disobedience of an unlawful order by whomsoever made. The defendant herein was proved to be a man with dependents which would, under the Selective Service Rules and Regulations, place him in a deferred class as 3-A. The questionnaire and evidence definitely show that the said defendant was a conscientious objector and could, under no rule of the Selective Service System be properly classed in class 1-A and inducted into military service. For the above reasons the orders of the Glendale, Arizona Selective Service Board, Maricopa County Local

Board No. 6 were unlawful and the Circuit Court of Appeals for the Ninth District has held that, "It is no violation of Section 11 of the Act to fail to obey an order which the Board had no power to make."

W. H. CHESTER,
Attorney for Defendant, 412 Phoenix Nat'l Bank Bldg., Phoenix, Arizona.

Received Copy this 9th day of June, 1943.
F. E. FLYNN,
United States Attorney.

[Endorsed]: Filed Jun. 9, 1943. [44]

In the United States District Court for the District of Arizona

April 1943 Term At Phoenix

MINUTE ENTRY OF
WEDNESDAY, JUNE 23, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

C-6414

[Title of Cause.]

On motion of Wm. H. Chester, Esquire, counsel for the defendant,

It Is Ordered that the duplicate of the Reporter's transcript, and the following exhibits admitted in evidence at the trial of this case be transmitted by

the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, with the transcript of record on Appeal herein:

Government's exhibits Numbers 1 to 9 inclusive.

Defendant's exhibit A. [45]

In the United States District Court for the District of Arizona

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said court, including the records, papers and files in the case of United States of America, plaintiff, versus Arley Virgle Tudor, defendant, numbered C-6414 Phoenix, on the docket of said court.

I further certify that the attached pages, numbered 1 to 45, inclusive, contain a full, true and correct transcript of such matters of record as are pertinent to the appeal in said cause, as the same appear from the originals thereof remaining on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the duplicate of the reporter's transcript, and the originals of Govern-

ment's exhibits 1 to 9, inclusive and of Defendant's exhibit A, in evidence, are transmitted herewith pursuant to order of the Court.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of $8.15 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 29th day of June, 1943.

[Seal] EDWARD W. SCRUGGS,
Clerk.
By WM. H. LOVELESS,
Chief Deputy Clerk. [46]

[Endorsed]: No. 10413. United States Circuit Court of Appeals for the Ninth Circuit. Arley Virgle Tudor, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed July 1, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10413

UNITED STATES OF AMERICA,

vs.

ARLEY VIRGLE TUDOR,

Defendant.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

The Appellant relies upon the assignments of error appearing in the transcript of the record as the Statement of Points on which Appellant intends to rely on Appeal and hereby refers to said Assignments of Error as appearing in said transcript and adopts the same as his Statement of Points on which Appellant intends to rely on appeal and incorporates the same herein, at this point, by reference as though set out herein in full.

W. H. CHESTER,
Attorney for Appellant, 412 Phoenix Nat'l Bank Bldg., Phoenix, Arizona.

Copy received July 12th, 1943.
F. E. FLYNN,
U. S. Attorney.
By E. R. THURMAN,
Asst. U. S. Attorney.

[Endorsed]: Filed July 13, 1943. Paul P. O'Brien, Clerk.

No. 10,413

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARLEY VIRGLE TUDOR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

W. H. CHESTER,
Attorney for Appellant
412 Phx. Nat'l Bank Bldg.
Phoenix, Arizona.

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX

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No. 10,413

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARLEY VIRGLE TUDOR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

JURISDICTION

Jurisdiction is invoked under Section 311, Title 50, United States Code Annotated, said statute being set forth in the 1942 Cumulative Pocket Part to Title 50 of the United States Code Annotated, page 130 of said pocket part which provides in substance that any person who shall knowingly fail or neglect to perform any duty required of him under the provisions of the Selective Service and Training Act of 1940, or the rules and regulations and directions thereunder shall upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000 or by both such fine and imprisonment.

INDICTMENT

United States of America
District of Arizona—ss.

Violation: 50 U. S. C. 311 Selective Training and Service Act.

In the District Court of the United States in and for the District of Arizona, at the November Term Thereof, A. D. 1942.

The Grand Jurors of the United States of America, impaneled, sworn and charged, on their oath aforesaid, of the Court aforesaid, on their oath present that on the 8th day of May, 1942, at Glendale, Arizona, and within the jurisdiction of this Court, Arley Virgle Tudor, whose full and true name other than as given herein is to the Grand Jurors unknown, being then and there a person liable for training and service under the Selective Training and Service Act of 1940, and the amendments thereto, and having theretofore registered under said Act, knowingly, wilfully, unlawfully, and feloniously did fail and neglect to perform a duty required of him under and in the execution of said Act and the Rules and Regulations duly made pursuant thereto, in this, that the said Arley Virgle Tudor, having been classified in Class 1-A by his local Board, being Maricopa County Local Board No. 6, created and located in Maricopa County, Arizona, under and by virtue of the provisions of the Selective Training and Service Act of 1940, as amended, and the Rules and Regulations issued thereunder, and said defendant having been notified by said board to report at Glendale, Arizona, on May 8, 1942, for induction into the land or naval forces of the United States, the action of said local board, as aforesaid, being pursuant to the power conferred upon said board

by the Selective Training and Service Act of 1940, and the amendments thereto, and the Rules and Regulations duly made pursuant thereto, did, knowingly, wilfully, unlawfully, and feloniously fail and neglect to report for induction, as aforesaid, as he was required to do by the notice and order of said board; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

F. E. FLYNN
United States Attorney

(Endorsed): Indictment A true bill, Sam W. Seaney Foreman.

(Endorsed): Filed Jan. 28, 1943. (T. R. 2-3)

PLEA OF NOT GUILTY

The appellant, Arley Virgle Tudor, entered a plea of not guilty upon his arraignment.

TRIAL

The cause herein came on regularly for trial in the Distirct Court of Arizona before the Honorable Dave W. Ling presiding with a jury on the 8th day of April, 1943, at Phoenix, Arizona.

STATEMENT

The appellant, Arley Virgle Tudor, is a member of Jehovah's Witnesses, a Christian Society engaged in the teaching and preaching of the Bible, and he is opposed to war. The said appellant, Arley Virgle Tudor, registered under the Selective Service Act of 1940, being title 50 of the United States Code, Chapter 301-311 inclusive, on November 19, 1940, and classified in class III-A. (T. R. 25, 26) Thereafter on September 30, 1941 he was re-classified in Class 1-H, which at that time was a deferred classification given to all

men in Class 1 over the age of 28. (T. R. 26-27). Later, and on or about February 13, 1942, the appellant was, as near as can be ascertained, classified in Class 1-A. (R. T.-P. 27-lines 10 to 16) (See Government's Exhibit 9 in Evidence.) The appellant's questionnaire was never notarized nor sworn to as provided under the Selective Service Rules and Regulations. (T. R. 25) In the questionnaire the appellant stated that he was a conscientious objector (T. R. 25) which claim was ignored entirely by the Glendale, Arizona local Selective Service board. Appellant was also supporting and had as dependents upon him, his mother, Ella Tudor, and his son, Roy L. Tudor (T. R. 24) (T. R. 46-47) and as such was entitled to classification III-A, under Selective Service Rules and Regulations—(Selective Service and Training Act of 1940 (Section 5(e)—Section 622.32).

The Maricopa County, Arizona Local Selective Service Board No. 6 at Glendale, Arizona ordered appellant to report for induction into the army on May 8th, 1942. Appellant did not appear for induction and was thereafter indicted and tried for failure to obey orders of Local Selective Service Board No. 6, Glendale, Maricopa County, Arizona and found guilty. This appeal follows conviction upon the charge as laid in the indictment.

SPECIFICATIONS OF ERROR

Specification of Error No. I.

That on the 17th day of February, 1943, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the indictment failed to state that the Glendale, Arizona local selective service board acted in ac-

cordance with the rules and regulations of the selective service system or that the defendant was subject to the orders made by the Glendale, Arizona local selective service board. That the Honorable Court erred in denying said motion to quash which order was entered on the 17th day of February, 1943. (T. R. 50)

Specification of Error No. II.

That the Honorable Court erred in admitting to evidence the Government's Exhibit No. 2 in evidence for the reason that said exhibit was a Selective Service Questionnaire that had not been executed in accordance with the rules of the Selective Service System in that it had not been sworn to as provided by said rules. (T. R. 50-51)

Specification of Error No. III.

That the Honorable Court erred in permitting testimony by Thomas Riordan as to what the Rules and Regulations of the Selective Service System were. (See pages 10, 11, 12, 13 of Reporter's Transcript). That such testimony could not be regarded as the best evidence and was not admissible. (T. R. 51)

Specification of Error No. IV.

That the Honorable Court erred in instructing the jury that even if a local Draft Board acted in an arbitrary and capricious manner, or denies a registrant a full and fair hearing nevertheless the registrant must comply with the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. It is the contention of the defendant that the Court is not bound to convict and punish one for disobedience of an unlawful order by whomsoever

made. The defendant herein was proved to be a man with dependants which would, under the Selective Service Rules and Regulations, place him in a deferred class as 3-A. The questionnaire and evidence definitely show that the said defendant was a conscientious objector and could, under no rule of the Selective Service System be properly classed in class 1-A and inducted into military service. For the above reasons the orders of the Glendale, Arizona Selective Service Board, Maricopa County Local Board No. 6 were unlawful and the Circuit Court of Appeals for the Ninth District has held that, "It is no violation of Section 311 of the Act to fail to obey an order which the Board had no power to make." (T. R. 51-52)

ARGUMENT

Assignment of Error No. I.

That on the 17th day of February, 1943, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the indictment failed to state that the action of the Glendale, Ariona local selective service board acted in accordance with the rules and regulations of the selective service system or that the defendant was subject to the orders made by the Glendale, Arizona local selective service board. That the Honorable Court erred in denying said motion to quash, which order was entered on the 17th day of February, 1943. (T. R. 50)

Every fact necessary to constitute the crime charged must be directly and positively alleged and nothing can be charged by implication or intendment.

Omission from the indictment of any fact or circumstance necessary to constitute an offense will be fatal.

U. S. vs. Cruikshank. 92 U. S. 542;

U. S. vs. Britton, 107 U. S. 655;
Harris vs. U. S., 104 Fed. (2nd) 41;
Kane vs. U. S., 120 Fed. (2nd) 990;
Pettibone vs. U. S., 148 U. S. 197.

Assignment of Error No. II.

That the Honorable Court erred in admitting to evidence the Government's Exhibit No. 2 in evidence for the reason that said exhibit was a Selective Service Questionnaire that had not been executed in accordance with the rules of the Selective Service System in that it had not been sworn to as provided by said rules. (T. R. 50-51)

Selective Training and Service Act of 1940 provides (section 605.1 (c) that every registrant must make the registrant's affidavit. If the registrant cannot read, the questions and answers thereto shall be read to him by the officer who administers the oath; and if he cannot write, his "X mark" signature must be witnessed by the same officer. None of the printed matter of the affidavit may be added to or erased or sticken out, except the word "swear" or "affirm" as the case may be.

Here the Glendale Local Selective Service Board violated the Selective Service law by failing to follow the rules and regulations set forth therein and made an order thereunder directing the appellant to appear for induction. It is the contention of the Appellant that the failure of the board to follow the Selective Service law made a subsequent order invalid, and it is the further contention of the appellant that he can not be criminally liable for failure to comply with the invalid order of the Selective Service Board. The order of induction made by the draft board after failure to observe the rules and regulations of the Selective Service law and after failure to give any consideration

or hearing whatsoever to the contention of the appellant that he was a conscientious objector not only invalided the said order, but such action was obviously arbitrary and it has been held in the case of United States vs. Johnson, 126 Fed. 2d 242 as follows: "the courts can prevent arbitrary action by administrative agencies, created by or under authority of Congress, in classifying registrants under Selective Service Act, from becoming effective, as in case of classification contrary to all substantial evidence, but a registrant cannot come to court for relief until he has exhausted all available and sufficient administrative remedies." We cannot see where there were any administrative remedies open to appellant to discover or correct the procedure of the board until after the time of his indictment. It is also the contention of the appellant that in practically all cases dealing with an administrative board's decisions or acts made arbitrarly or capriciously without evidence or contrary to evidence may be inquired into by the Federal courts and where necessary such decisions or acts may be set aside.

Angellus vs. Sullivan, 246 Fed. 54 (CCA 2d);
Boitano vs. District Board, 250 Fed. 812;
United States vs. Kinkead, 250 Fed. 692 (CCA 3d);
Ex parte Fuston, 250 Fed. 90;
St. Joseph Stock Yards vs. U. S., 298 U. S. 38, 52, 53, 74, 75.

Assignment of Error No. III.

That the Honorable Court erred in permitting testimony by Thomas Riordan as to what the Rules and Regulations of the Selective Service System were. (See pages 10, 11, 12, 13 of Reporter's Transcript). That such testimony could not be regarded as the best evidence and was not admissable. (T. R. 51)

It is the contention of the appellant that the Rules and Regulations of the Selective Service System are the best evidence as to the provisions of said Rules and Regulations and that there was no reason assigned by the government for failure to produce the Rules and Regulations themselves or has a reason for introducing secondary evidence as to what said rules contained. Rules of evidence as to what is the best evidence are so fundamental that it is unnecessary to set forth any further argument.

Assignment of Error No. IV.

That the Honorable Court erred in instructing the jury that even if a Local Draft Board acted in an arbitrary and capricious manner, or denies a registrant a full and fair hearing nevertheless the registrant must comply with the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. It is the contention of the defendant that the Court is not bound to convict and punish one for disobedience of an unlawful order by whomsoever made. The defendant herein was proved to be a man with dependants which would, under the Selective Service Rules and Regulations, place him in a deferred class as 3-A. The questionnaire and evidence definitely show that the said defendant was a conscientious objector and could, under no rule of the Selective Service System be properly classed in class 1-A and inducted into military service. For the above reasons the orders of the Glendale, Arizona Selective Service Board, Maricopa County Local Board No. 6 were unlawful and the Circuit Court of Appeals for the Ninth District has held that, "It is no violation of Section 311 of the Act to fail to obey an order which the Board had no power to make." (T. R. 51-52).

The Transcript of Record clearly shows that the appellant herein had dependants whom he was supporting at the time he was re-classified into class 1-H and at the time he was again re-classified into class 1-A, and the order for induction was made. The Transcript of

Record shows this clearly on pages 46 and 47 thereof under the testimony of Ella Tudor:

Ella Tudor was called as a witness on behalf of defendent, and being first duly sworn, testified as follows:

Mr. Chester:

Q. Will you state your name?
A. My name is Ella Tudor.

Q. What relation are you to the defendant?
A. I am his mother.

Q. And do you live with the defendant?
A. Not since the law has been dragging him around. Until then I did.

Q. But until that time you did?
A. Yes, sir.

Q. Did you work? A. Me?

Q. Yes.
A. We both worked. We are supposed to work.

Q. What work did you have?
A. I did housework. I worked for him, kept house.

Q. Kept house for him? A. Yes.

Q. And was there any others in the family?
A. His son—my grandson.

Q. How old is he? A. Thirteen.

Q. Does he live with you and Mr. Tudor?
A. He lives with me and his father.

Q. Up until the time he was brought back from Illinois? A. Until he was arrested.

Q. The son does not work, does he?
A. Sir?

Q. The son does not work, does he, the boy does he work? A. The little boy?

Q. Yes.

A. Well, he goes to school.

Q. Is he living with Mr. Tudor now?

A. No, he isn't with us now. I brought him back here and sent him to his mother when they put him in jail. What could we do then? They broke up our home. We couldn't keep house and him in jail and us somewhere else.

Testimony of the defendant which was uncontroverted showed that he had dependents being his mother and his son. (T. R. 46)

The Selective Service Board cannot bind a registrant by an arbitrary classification against all of the substantial information before it as to his proper classification. Classifications by such agency must, under the powers given it by Congress be honestly made, and a classification made in the teeth of all substantial evidence before such agency is not honest but arbitrary.

Under recross examination, Mr. Riordan, secretary of Local Selective Service System Board, Glendale, Arizona, testifies definitely that there was no evidence showing that appellant was no conscientious objector. His testimony further showed that there was no hearing as to this matter nor was there any evidence to disapprove appellant's claim that he should be classified as a conscientious objector. See Reporter's Transcript, pages 39 to 41 inclusive:

Recross Examination

MR. CHESTER:

Q. Mr. Riordan, of course that matter—what matters came up regarding the classification as a conscientious objector?

A. Well, he had a notation in there that he was a conscientious objector in one part of the questionnaire, and in another part of the questionnaire he had a mark with an "X" that he was opposed to both combatant and non-combatant service, and the Board felt that he was not a conscientious objector; that is, they didn't think—they felt he should be put in Class 1-A, and with the idea that if he was a conscientious objector and did not like their ruling that he had the right of appeal, but in their opinion they felt he was not a conscientious objector.

Q. Was there any testimony offered as to the reason why he should not be classified as a conscientious objector; anything to show that his request of his application as a conscientious objector was wrong or that he was not telling the truth about that?

MR. WALSH: I object to that, your Honor, as immaterial.

THE COURT: Well, we should find out what they did. Maybe they just sat back and said, "He is not." I could have said the same thing. What do I know about it? It had to be based on something.

MR. WALSH: The Board is under no requirement to take evidence. As a matter of fact, the Regulations provide they shall pass on nothing except what is in the file.

THE COURT: The question is whether he had a hearing, and not the sufficiency of the evidence. I

can't review that, but if he had no hearing, why, I certainly could review that.

MR. CHESTER: Q. Now, upon what matters was this decision based?

A. Well, they felt—they said, "Well, the fact he says, 'I am a conscientious objector' with nothing else to substantiate it", they felt that that was not sufficient, and they would classify him 1-A. The fact he said, "I am a conscientious objector," why, they felt that that was not enough evidence to prove to them that he was a conscientious objector, knowing he had the right of appeal in the event he was put in Class 1-A. They discussed that. That if he is a conscientious objector and he is not satisfied with his classification, then he has the right of appeal to the Board of Appeals.

Q. Did the Board send him a conscientious objector's form?

A. No, sir.

Q. You have nothing before you to show the exact status of this man's conscience then as to what his objections were to combat service?

A. No, no other than his statement.

MR. CHESTER: That is all.

MR. WALSH: Q. You did have everything that he had ever filed with the Board?

A. Yes; everything that he had written or filed was in his cover sheet at the time.

MR. WALSH: That is all.

The instruction as given by the court was contrary to law.

U. S. vs. Johnson, 126 Fed. (2nd) 242;
Angellus vs. Sullivan, 246 Fed. 54;
Ex Parte Stewart, 49 Fed. Supp 410;
Ex Parte Stewart, 47 Fed. Supp. 410;
Boitano vs. District Board, 250 Fed. 812;
U. S. vs. Kinkead, 250 Fed. 692;
St. Joseph Stockyards vs. U. S., 298 U. S. 38.

It follows that the Court should have directed the verdict and left the defendant where it found him subject under the law to the further orders of his local board.

It is respectfully submitted that the Judgment of the District Court should be reversed.

Dated, Phoenix, Arizona,

August 26, 1943.

W. H. CHESTER,
Attorney for appellant,
412 Phx. Nat'l Bank Bldg.
Phoenix, Arizona.

No. 10413

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

ARLEY VIRGLE TUDOR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

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BRIEF FOR THE APPELLEE

FRANK E. FLYNN,
United States Attorney,
District of Arizona.

E. R. THURMAN,
Assistant U. S. Attorney.

Attorneys for Appellee.

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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No. 10413

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

ARLEY VIRGLE TUDOR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

An indictment was returned on January 28, 1943, charging the appellant with failure to perform a duty required of him under the Selective Training and Service Act of 1940, 50 U. S. C. 311, in that he failed and neglected to report for induction into the land and naval forces of the United States when required to do so by his local Selective Service Board (T.R. 2, 3).

A motion to quash the indictment was denied March 23, 1943 (T.R. 4).

The case was tried to a jury on April 8, 1943 (T.R. 5). Notice of appeal was filed April 19, 1943 (T.R. 6, 7, 8).

The appellant, Arley Virgle Tudor, on October 16, 1940, registered under the Selective Training and

Service Act of 1940, being Title 50 of the United States Code, Chapter 301-311, inclusive, with his Selective Service Board, being Maricopa County Local Board No. 6 (T.R. 19), and was on November 26, 1940, classified as III-A for the reason he was a married man and had children (T.R. 26). Thereafter, on September 30, 1941, he was reclassified in Class I-H, which at that time was a deferred classification given to all men in Class I over the age of twenty-eight (T.R. 26, 27). Subsequent thereto, on February 13, 1942, appellant was reclassified I-A (R.T. 13), and thereafter, on April 21, 1942, he was notified by his said Board to report on May 8, 1942, for induction into the land or naval forces of the United States (R.T. 27). Appellant failed to report (R.T. 22).

Appellant did not deny that the Local Board had jurisdiction over him, that he was not deprived of any procedural rights, that he received the appropriate notices of his classifications or of his order to report for induction, or that he failed to respond to the order. He sought, however, upon cross-examination of the Government's witnesses and through his own witnesses, to show his classification was erroneous.

QUESTIONS PRESENTED

1. Whether the indictment is defective.

2. Whether the Court erred in the admission of certain evidence.

3. Whether the Court erred in permitting testimony of a certain Government witness.

4. Whether the Court erred in instructing the jury.

SUMMARY OF ARGUMENT

In answering appellant's argument we will discuss the points raised in the order in which they are taken up in Appellant's Brief.

ASSIGNMENT OF ERROR NO. I

This assignment has to do with the sufficiency of the indictment. That an indictment must charge each and every essential element of an offense is a well established principle of law. The authorities cited by appellant (App. B. 6, 7) merely reaffirm this principle.

In *Harris v. United States, 104 Fed. 2d 41,* cited by appellant, the indictment was not in the wording of the statute and failed to allege an important element of the offense, namely, that the false entry was made in any record which defendant was required to keep in connection with his official duties.

In *United States v. Britton, 107 U. S. 655* (App. B. 7), the indictment failed to plead an exception stated in the enacting clause of the statute. No such question is raised in the present case.

The other cases cited by appellant on this point state correct principles of law but are not helpful in the application of the law to the present case. The indictment in question contains allegations of all the elements of the crime. It alleges that appellant registered under the Selective Training and Service Act of 1940, that he was classified by the Board as I-A, that he was a person liable for training and service under the said Selective Service Act, and that he was duly notified by his said Board to report at a specified time and place for induction into the land or naval forces of the United States, and that the action of the said

Local Board was pursuant to the power conferred upon the said Board by the Selective Training and Service Act of 1940. The indictment further states that said Local Board was created in Maricopa County, Arizona, under and by virtue of the provisions of the said Selective Training and Service Act of 1940. The offense charged is that he failed to perform a duty required of him, namely, to report for induction into the land or naval forces of the United States, as required to do by the said notice and order of his said Board.

50 U.S.C. 311.

The offense is directly alleged in the indictment (T.R. 2, 3).

The indictment was sufficient under the provisions of Title 18 U. S. C., Section 556, and the authorities cited in the note. It fully informs the appellant of the nature of the charge so as to enable him to prepare his defense. It was also sufficiently definite to support a plea of former acquittal or conviction against another charge for the same offense.

Moore v. U. S., 128 Fed. 2d 974.

Zuziak v. U. S., 119 Fed. 2d 140 (9 Cir.)

Graham v. U. S., 120 Fed. 2d 543.

Woolley v. U. S., 97 Fed. 2d 258 (9 Cir.)

The general rule is that if the language in the indictment is sufficient to apprise the accused, with reasonable certainty, of the nature of the accusation against him, an indictment drawn in the language is sufficient.

See *U. S. v. Henderson* (C.C.A.D.C. 1941), 121 Fed. 2d 75.

Potter v. U. S., 155 U. S. 438.

Summers v. U. S. (C.C.A. 4, 1926), 11 Fed. 2d 583; certiorari denied 271 U. S. 681.

The indictment in this case certainly follows the language of the statute.

This indictment fairly informs the accused of the charge which he is required to meet and is sufficiently specific to avoid the danger of his again being prosecuted for the same offense. Consequently, it should not be held insufficient.

See *Hewitt v. U. S.* (C.C.A. 8, 1940), 110 Fed. 2d 1, 6.

Hagner v. U. S., 285 U. S. 427, 431.

Beard v. U. S. (App. D.C.), 82 Fed. 2d 837, 840.

The appellant, in his argument on Assignment of Error No. I (App. B. 6), argues that the indictment does not state facts sufficient to constitute a crime or offense and that the indictment failed to state that the Glendale, Arizona, local Selective Service Board acted in accordance with the rules and regulations of the Selective Service System, or that the defendant was subject to the orders made by said Board. We find very little merit in appellant's contention, for the indictment sets forth in clear and concise language that "the action of said local board, as aforesaid, being pursuant to the power conferred upon said board by the Selective Training and Service Act of 1940, and the amendments thereto, and the Rules and Regulations duly made pursuant thereto."

With respect to appellant's contention that the indictment does not contain sufficient facts to show that

the appellant was subject to the orders made by the said Local Board, we wish to call the Court's attention to the allegation in the indictment which reads as follows:

> "Arley Virgle Tudor, * * *, being then and there a person liable for training and service under the Selective Training and Service Act of 1940, and the amendments thereto, and having theretofore registered under said act, * * *."

From a perusal of the indictment and a reading of the cases cited in support of appellee's position, we believe that the indictment is good and that the Court did not err in denying appellant's said motion to quash.

ASSIGNMENT OF ERROR NO. II (App. B. 7)

This assignment has to do with the appellant's objections to the admission in evidence of the Government's Exhibit No. 2, for the reason that the said exhibit, being a Selective Service questionnaire, had not been sworn to as provided by the rules of the Selective Service System.

Appellant claims that the Selective Training and Service Act of 1940, Section 605.1(c), contains certain definite language (App. B. 7).

We have been unable to find any section of the Selective Training and Service Act of 1940 that so provides. Neither have we been able to find or locate in the Selective Service Manual, under Section 605.1(c), any such language. However, we do find, on the back of the questionnaire (Form 40), the language used by appellant in his brief. In other words, the language that appellant attributes to Section 605.1(c) of said Act of 1940 is merely an instruction upon the Selective

Service questionnaire and governed by Section 621.5 of Part 621 of the Selective Service Manual under the general heading of "Questionnaire and General Information," which said section is as follows:

> "621.5 Inadequate Questionnaire. When a registrant's Selective Service Questionnaire (Form 40) omits needed information, contains material errors, or shows that the registrant failed to understand the questions, the local board *may* return the Selective Service Questionnaire (Form 40) to the registrant for correction and completion and direct him to return same so completed and corrected on or before a specified date. While compliance with the instructions upon the Selective Service Qestionnaire (Form 40) is required, the local board should be guided by common sense rather than technicalities." (Italics ours.)

Under the above and foregoing section, the Board could have returned the appelant's questionnaire to him for corerction. However, it was not mandatory. It will be noted that the above section clearly indicates that the Selective Service Board is not to be technical with respect to compliance with the instructions upon the questionnaire, and it is specifically set forth that the Board should be guided by common sense rather than technicalities. It appears to us that appellant is attempting to take advantage of his own disregard for the instructions with respect to the executon of the questionnaire.

The appellant also states in his argument on Assignment of Error No. II that the Local Board failed to follow the Selective Service Law, and for that reason its orders were invalid, and therefore contends that he cannot be criminally liable for failure to comply with any such invalid order of the Board. However, outside of

appellant's statement that the questionnaire was not properly executed, appellant's general allegations fail to include any other matters or things that the Selective Service Board failed to comply with under the Selective Service law. It will be noted that the appellant failed to request from or file with his Local Board the special form for conscientious objectors, being Form 47 (R. T. 35), which is mandatory under and by virtue of Section 621.3 of the Selective Service Manual, which reads as follows:

> "621.3 Special Form for Conscientious Objector. A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on a Special Form for Conscientious Objector (Form 47) which, when filed, shall become a part of his Selective Service Questionnaire (Form 40). The Local Board, upon request, shall furnish to any person claiming to be a conscientious objector a copy of such Special Form for Conscientious Objector (Form 47)."

Here, again, the appellant attempts to place the burden upon his Selective Service Board, which the law, and the rules and regulations promulgated in accordance with the Selective service Act of 1940, clearly place upon his shoulders, and his alone.

Again, we wish to reiterate that the appellant never availed himself of the appeal allowed by law in cases of this kind (R. T. 14), and, therefore, the registrant cannot come to Court for relief until he has exhausted all available and sufficient administratve remedies.

It seems that the appellant is laboring under the erroneous premise that he may disobey the order of his Selective Service Board, and, when he is placed on trial for the violation, have the Court go into the proposition of whether his Selective Service Board acted

arbitrarily or capriciously. In support of his contention he cites several cases which we have read, but find that they are not in point and are of absolutely no help in determining the issue raised by appellant.

It is the contention of appellee that until the appellant has exhausted all available and sufficient administrative remedies, he will be unable to seek relief before a Court.

See U. S. v. Johnson (C. C. A. 8), 126 Fed. 2d 242-246.

U. S. v. DiLorenzo, 45 Fed. Supp. 590.

Fletcher v. U. S., 129 Fed. 2d 262.

Rase v. U. S., 129 Fed. 2d 204.

We quote the following from the case of *U. S. v. Alois Stanley Mroz* (C. C. A. 7), 136 Fed. 2d 221, decided June 3, 1943:

> "The Act itself (50 U. S. C. A. Sec. 310 (a) (2)) provides:
>
> 'The decision of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.'
>
> "Appellant dwells on lack of a due process hearing, and on arbitrary and capricious action. He seemingly fails to realize that war is realistic, that the emergency requires immediate mobilization of a large manpower; that each case must be handled individually yet speedily. The Act provides for the administrative set up to handle this titanic task expeditiously. Each individual answers his questionnaire, and can supplement it with any other evidence he wishes to present in support of his claimed exemption. If the Board's ruling be adverse to him, he may appeal, * * *."

> "Appelant's clear and unqualified duty was to comply with his draft board's order. He can not 'take the law into his own hands' and render himself invulnerable to consequences. The draft machinery has been legally set up, and it is not for the individual to constitute himself judge of his own case."

From the above and foregoing, we believe that the trial court did not err in admitting Government's Exhibit No. 2 in evidence.

ASSIGNMENT OF ERROR NO. III (App. B. 8, 9)

This assignment of error refers to the testimony of Mr. Thomas Riordan as to what the rules and regulations of the Selective Service System were. The appellant bases his assignment of error on the premise that such testimony could not be regarded as the best evidence and was not admissible (App. B. 8). Appellant contends that such testimony by Mr. Riordan is found on pages 10, 11, 12 and 13 of the Reporter's Transcript. We have searched those enumerated pages of the Reporter's Transcript most thoroughly but have been unable to find where Mr. Riordan testified as to what the rules and regulations of the Selective Service System were, other than the following, commencing with line 24 at the bottom of page 10 of the Reporter's Transcript:

> "A He was, he was reclassified on September 30th, 1941. At that time we had Rules and Regulations that came out that all men who were over the age of 28 years of age should be classified in 1-H, * * *."

And again, at the bottom of page 12, commencing with line 22, Mr. Riordan testified as follows:

> "We received these new Regulations stating that all men classified in 1-H should be reclassified in Class 1, so—."

Mr. Riordan has been the clerk of Maricopa County Local Board No. 6 ever since its inception (R. T. 3), and therefore an executive officer of the Board, and was entitled to testify as to what were the regulations surrounding the registration, classification and other details appertaining to the case of this appellant which were before the said Selective Service Board.

Certainly the Court would take judicial notice of the Selective Training and Service Act of 1940 and the amendments thereto, and the rules and regulations duly made pursuant thereto. In support of this contention, appellee cites the following cases:

Gardner v. Collector of Customs, 73 U. S. 499.

Bellaire, Benwood & Wheeling Ferry Co. v. Interstate Bridge Co., 40 Fed. 2d 323.

Downey v. Geary-Wright Tobacco Co., 39 Fed. Supp. 33.

Caha v. U. S., 152 U. S. 211-222.

Cohen v. U. S., 129 Fed. 2d 733.

In the case of *Gardner v. Collector of Customs, supra,* we find the following language, at page 508 of the opinion:

> "The statute under consideration is a public statute, as distinguished from a private statute. It is one of which the courts take judicial notice without proof, and, therefore, the use of the words 'extrinsic evidence' are inappropriate."

And at the top of page 509, we find the following:

> "The judicial notice of the court must extend, not only to the existence of the statute, but to the time at which it takes effect, and to its true construction."

We quote from *Downey v. Geary-Wright Tobacco Co., supra,* as follows:

> "The federal district court must take judicial notice not only of provisions of Agircultural Adjustment Act but of all rules and regulations made and promulgated under its authority."

We find in the case of *Cohen v. U. S., supra,* that the district court could take judicial notice of federal statutes and regulations of the Works Progress Administration.

We believe that the case of *Caha v. U. S., supra,* commencing at the bottom of page 221, clearly states the rule, and we quote:

> "Another matter is this: The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in

pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

We believe the above and foregoing cases clearly show the Court committed no error in permitting the witness to testify with respect to the regulations promulgated under and by virtue of said Selective Training and Service Act of 1940, for his testimony could not have been prejudicial to the appellant in any degree.

ASSIGNMENT OF ERROR NO. IV (App. B.9)

This assignment refers to the instructions of the Court to the jury, and has for its basis that the trial court erred in instructing the jury that even if a Local Draft Board acted in an arbitrary and capricious manner, or denies a registrant a full and fair hearing, nevertheless the registrant must comply with the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. We believe that the judge's instruction, claimed as error by appellant in this case, correctly states the law (R. T. 57, 58), and in support of the instruction we cite the following cases:

U. S. v. Johnson (C. C. A. 8), 126 Fed. 2d 242-246.

U. S. v. Grieme (C. C. A. 3), 128 Fed. 2d 811.

Rase v. U. S. (C. C. A. 6), 129 Fed. 2d 204.

U. S. v. Kauten (C. C. A. 2), 133 Fed. 2d 703.

U. S. v. Grieme, supra, states the law appertaining to cases of this nature in this very able language:

"The registrant may not, however, disobey the Board's orders and then defend his dereliction by

collaterally attacking the Board's administrative acts."

Also, in *Rase v. U. S., supra,* we find this language:

"No power to review any classification, or the denial of an exemption, is conferred upon the courts."

We quote from *U. S. v. Kauten, supra,* as follows:

"Indeed it has become the general rule that where Congress has delegated to an administrative authority a certain field of governmental activity and made its acts final, the courts will not interfere until the administrative proceedings have been concluded and any administrative remedy that may exist has been exhausted. Under this rule there would seem to have been no good reason for interrupting proceedings leading to induction until some substantial physical restraint occurred. Then the writ of habeas corpus is sufficient to remedy any irregularities of Draft Boards and to satisfy all reasonable scruples on the part of inductees. Moreover, it is the practice of the Army to grant a furlough of seven days after a registrant is formally inducted before he is subject to military training. This gives him time to apply for a writ of habeas corpus without disturbing the selective service machinery, if he thinks that his rights as a conscientious objector have been infringed.

"*It results from the foregoing that the registrant was bound to obey the order to report for induction even if there had been error of law in his classification.* The Administrative Board has jurisdiction of his case and its order could not be wilfully disregarded." (Italics ours.)

SUMMARY

The indictment was sufficiently definite to inform appellant of the nature of the charge and to support a plea of former jeopardy.

Appellant had a fair and impatrial trial, and the verdict and judgment should be affirmed.

Respectfully submitted,

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E. R. THURMAN,
Assistant U. S. Attorney.
Attorneys for Appellee.

No. 10413

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

ARLEY VIRGLE TUDOR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

---

REPLY BRIEF OF APPELLANT

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No. 10413

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

ARLEY VIRGLE TUDOR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANT

Reply to brief of appellee herein will follow appellee's statements as to questions presented which is as follows:

QUESTIONS PRESENTED

1. Whether the indictment is defective.

2. Whether the Court erred in the admission of certain evidence.

3. Whether the Court erred in permitting testimony of a certain Government witness.

4. Whether the Court erred in instructing the jury.

ASSIGNMENT OF ERROR NO. I

This assignment has to do with the sufficiency of the indictment. Appellee claims that every essential element of the offense has been set forth in the indictment. It has been heretofore called to the attention of the Court that the aforesaid indictment does not at any place state that Maricopa County local board No. 6 of the Selective Service system located in Glendale, Arizona, had jurisdiction over the defendant herein. Nor is it shown under the said indictment that the said Selective Service Board followed the laws, rules and regulations and orders of the Selective Service and Training Act of 1940 and Amendments thereto. It is the contention of the defendant that the jurisdiction of the board and its adherence to the law under which it acted is a necessary part of the indictment to show that an offense was committed.

ASSIGNMENT OF ERROR NO. II

This assignment has to do with the appellant's objections to the admission in evidence of the Government's Exhibit No. 2. Section 605.1 of the Selective Service Manual provides for the administration of oaths and the way in which such oaths shall be administered. The questionnaire form itself provides that the form shall be under oath. The rules and regulations promulgated under the Selective Service and Traniing Act of 1940, were very clearly not followed by the Selective Service Board in that case. This in itself as regards to questionnaire would be of little import except that irregularity in the proceedings of the Board are shown to exist in the very inception of this particular case which tendency of the Board colored the entire proceeding had in connection with the defendant herein.

The Selective Service and Training Act of 1940, provides under Section 303 (g) as follows:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

Here it is shown that the Selective Service Board was advised of the defendant's status as a conscientious objector which they chose to entirely ignore in direct contravention to the provisions of Section 303 (g) of the Selective Service and Training Act of 1940 as above set out. It is the contention of the defendant that any order of induction placing him in combatant service under such circumstances is invalid, unlawful and void.

ASSIGNMENT OF ERROR NO. III

This assignment refers to the testimony of Mr. Thomas Riordan as to what the rules and regulations of the Selective Service System were. On Page 10, Line 24 of the Reporter's Transcript begins the testimony of said Thomas Riordan which was in part as follows:

"At that time we had Rules and Regulations that came out that all men that were over 28 years of age

should be classified in 1-H, so when the registrant Tudor's file came up for reclassification, we found he was over 28 years of age. As I say, that was on September 30th, 1941, so he was placed in Class 1-H. Subsequent to the Declaration of War, we received new Rules and Regulations stating that all men—"

Exception was promptly taken protesting to the witness's testifying to what the Selective Service Rules and Regulations were. (R. T. 11)

The witness again testified as follows: (R. T. 12, Line 22)

"We received these new Regulations stating that all men classified in 1-H should be reclassified in Class 1, so—"

Objection was duly taken there at the time of such testimony and said objection overruled and exception taken whereupon the witness was allowed to proceed.

It is still the contention of this defendant that the Rules and Regulations themselves are the best evidence and that the objection to the testimony of Mr. Riordan as to what the Rules and Regulations were should be stricken. We call the attention of the Court that this was a trial before a jury and that the mere fact that the Court could take the judicial notice of what the Selective Service Training Act of 1940 and the amendments thereto and the Rules and Regulations in no wise changes the rules of evidence and that allowing such testimony as to what the Rules and Regulation were was an error on the part of the Court, and prejudicial to the appellant.

ASSIGNMENT OF ERROR NO. IV

This assignment refers to the instructions of the Court to the Jury. Appellant bases his objection to the instruction given on the fact that the Court in no wise gave cognizance or effect to 303 (g) of the Selective Service and Training Act of 1940, which provides as follows:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

But the Court's instruction was to the effect that the Board could arbitrarily and capriciously and without following the Selective Service and Training Act of 1940 and without a full and fair hearing make an order which the defendant was bound to obey despite the fact that the order of the Board was unlawful. During the course of the trial two things were shown and not contradicted that would definitely place the defendant in a class other than 1-A under the Selective Service and Training Act of 1940, namely:

1. Defendant was shown to be a conscientious objector and that the local Selective Service Board No.

6, Maricopa County, was notified thereof in the questionnaire of the defendant. (A. R. 23, A. R. 25)

2. It definitely proved that the defendant had dependents whom he was supporting which according to the Selective Service and Training Act of 1940, would placed him in deferred classification, namely, 3-A. It has been held by the Circuit Court of Appeals of the Ninth District as follows:

"It is no violation of Section 311 of the Act to fail to obey an order which the Board had no power to make."

Robert Earl Hopper vs. United States of Amercia, No. 10, 110 Dec. 18, 1942, Circuit Court of Appeals for the Ninth Circuit.

SUMMARY

The indictment was insufficient.

The Court erred in the reception and rejection of evidence.

The Court erred in denying the appellant's motion for a directed verdict.

The Court erred in instructing the jury.

Respectfully submitted,

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